



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

A

744,791

PROPERTY OF

*The
University of
Michigan
Libraries*

1817

ARTES SCIENTIA VERITAS



William Pinkney

Hulton Press

31168
E. B. H. H. H.

SOME ACCOUNT
OF THE
LIFE, WRITINGS, AND SPEECHES
OF
WILLIAM PINKNEY.

BY HENRY WHEATON.

Ardebat cupiditate sic, ut in nullo unquam flagrantius studium viderim. Erat in verborum splendore elegans, compositione aptus, facultate copiosus: in disserendo mira explicatio cum de jure civili, cum de æquo et bono disputaretur, argumentorum et similitudinum copia.

Cic. Brutus.

NEW-YORK:
PRINTED AND PUBLISHED BY J. W. PALMER & CO.

.....
1826.

E
302
.p65

Southern District of New-York, ss.

BE IT REMEMBERED, that on the 28th day of April, A. D. 1826, in the 50th year of the Independence of the United States of America, Henry Wheaton, of the said District, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit :

"Some Account of the Life, Writings, and Speeches of William Pinkney."
By Henry Wheaton. Ardebat cupiditate sic, ut in nullo unquam flagrantius studium viderim. Erat in verborum splendore elegans, compositione aptus, facultate copiosus : in disserendo mira explicatio : cum de jure civili, cum de æquo et bono disputaretur, argumentorum et similitudinum copia."

In conformity to the Act of Congress of the United States, entitled "An Act for the encouragement of Learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies during the time therein mentioned." And also to an Act, entitled "An Act supplementary to an Act, entitled an Act for the encouragement of Learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

JAMES DILL,
Clerk of the Southern District of New-York.

CONTENTS.

PART FIRST.

| | Page |
|---|------|
| Memoir, Private Correspondence, &c..... | 5 |

PART SECOND.

| | |
|--|-----|
| No. I.—Opinions delivered at the Board of Commissioners, under the 7th Article of the Treaty of 1794, between the United States and Great Britain..... | 193 |
| No. II.—Memorial on the Rule of the War of 1756 | 372 |
| No. III.—Private Correspondence with Mr. Madison..... | 397 |
| No. IV.—Speech in the Case of the Nereide..... | 465 |
| No. V.—Speech in the House of Representatives on the Treaty-Making Power..... | 517 |
| No. VI.—Argument on the Right of the States to tax the National Bank | 550 |
| No. VII.—Speech on the Missouri Question..... | 573 |
| No. VIII.—Opinion in the Case of Cohens against the State of Vir- ginia | 612 |

ERRATA.

Page 113, l. 7—for " matters," read *masters*.

l. 15—for " unto," read *into*.

Page 131, l. 29—for " our," read *an*.

DIRECTION TO THE BINDER.

Portrait to face title-page.

Fac-simile to face Part II, page 193.

SOME ACCOUNT
OF THE
LIFE, WRITINGS, AND SPEECHES
OF
WILLIAM PINKNEY.

PART FIRST.

WILLIAM PINKNEY was born at Annapolis, in Maryland, on the 17th of March, 1764. His father was a native of England, and adhered to the cause of the parent country, in our struggle for independence, whilst the son avowed, even in early youth, his ardent attachment to the liberties of America. His early education was imperfect, but probably as good as could be obtained in this country during the war of the revolution. He was initiated in classical studies by a private teacher of the name of Brat-haud, who took great pains in instructing him, and of whom he always spoke with the warmest affection and gratitude. He commenced the study of medicine, but soon found that he had

mistaken his vocation, and resorted to that of the law under the late Mr. Justice Chace, then an eminent practitioner at the bar of Maryland. That province had been distinguished among the colonies by a succession of learned and accomplished lawyers. With such a guide and in such a school, his studies were of no superficial kind. He commenced his law studies in February, 1783, and was called to the bar in 1786. His very first efforts seem to have given him a commanding attitude in the eye of the public. His attainments in the law of real property and the science of special pleading, then the two great foundations of legal distinction, were accurate and profound; and he had disciplined his mind by the cultivation of that species of logic, which, if it does not lead to the brilliant results of inductive philosophy, contributes essentially to invigorate the reasoning faculty, and to enable it to detect those fallacies which are apt to impose upon the understanding in the warmth and hurry of forensic discussion. His style in speaking was marked by an easy flow of natural eloquence and a happy choice of language. His voice was very melodious, and seemed a most winning accompaniment to his pure and effective diction. His elocution was calm and placid—the very contrast of that strenuous, vehement, and emphatic manner, which he subsequently adopted.

He removed to Harford county in 1786, for the purpose of pursuing the practice of his profession, and in April, 1788, was elected a delegate from that county to the Convention of the State

of Maryland which ratified the constitution of the United States. But I have not been able to find any traces of the part he took in the deliberations of that body ; and, in general, I have to regret that my endeavours to discover those distinctive traits of his earlier life, which mark the development of youthful character and talent, and which constitute one of the most pleasing portions of biography, have not been attended with success.

Mr. Pinkney was elected in October, 1788, as a representative to the House of Delegates of Maryland from the county of Harford, which he continued to represent until the year 1792, then he removed to Annapolis.

In 1789, he was married, at Havre de Grace, to Miss Ann Maria Rodgers, daughter of John Rodgers, Esq. of that town, and sister to that distinguished officer, Commodore Rodgers, of the navy.

In 1790, he was elected a member of Congress, and his election was contested upon the ground that he did not reside in the District for which he was chosen, as required by the law of the State. But he was declared duly elected, and returned accordingly, by the Executive Council, upon the principle that the State Legislature had no authority to require other qualifications than those enumerated in the constitution of the United States ; and that the power of regulating the times, places, and manner of holding the elections, did not include that of superinducing the additional qualification of residence within the District for which

the candidate was chosen. He made on the occasion, what was considered, a very powerful argument in support of his own claim to be returned; but declined on account of his professional pursuits, and the state of his private affairs, to accept the honour which had been conferred upon him.

At the first Session of the Legislature of Maryland after his election as a member of the House of Delegates in 1788, he made a speech upon the report of a committee appointed to consider the laws of that State, prohibiting the voluntary emancipation of slaves, which breathes all the fire of youth and a generous enthusiasm for the rights of human nature, although it may not perhaps be thought to give any pledge of those great powers of eloquence and reasoning which he afterwards displayed.* At the subsequent Session in 1789, he delivered the following speech on the same subject, which, as he himself said in a letter to a friend written at the time when his consistency was impeached for the part he took in the Missouri question, is "much better than the first speech, and for a young man is well enough."

"MR. SPEAKER—As I have formerly had the honour of giving my sentiments to the House of Delegates, on the measures now under their consideration, and the mortification too of seeing those sentiments disregarded, I should hardly think of lending them again the aid of my feeble exertions, if I was not too thoroughly persuaded of their importance, to imagine I had done my duty by giving them my approbation in silence.

* A part of this speech will be found in *Carey's Museum*, vol. vi. p. 74.

"That I have every possible reason to be discouraged from the prosecution of regulations of this sort, it would be folly in me to doubt; for I have more than once been sorry to find, that in a country which has set even distant Europe in a ferment, and lavished the blood of thousands in defence of its liberties, against the encroachments of an arrogant and abandoned government, the cause of freedom was yet the most unpopular in which an advocate could appear. The alarms occasioned by mistaken ideas of interest, the deep-rooted prejudices which education has fostered and habit matured, the general hereditary contempt for those who are the objects of these provisions, the common dread of innovation, and, above all, a recent defeat, are obstacles which would seem sufficient to damp, if not entirely extinguish, the ardour of exertion.

"But with me these difficulties only serve to rouse every faculty of mind and body, which the occasion demands, and to call forth that spirit of perseverance, which no opposition can subdue, but that which affords me conviction of my error.

"Sir—In my judgment, this is no common cause. If ever there were cases which demanded parliamentary interference, such are now before you. For the honour of human nature, for the sake of justice, from a respect to the interest of the community, they ought to receive the peculiar attention, the impartial, deliberate decision of the legislature.

"But, while the illusions of pride and selfishness, or the clouds of early ill-founded opinions, blind us to the truth; while we continue to be fettered by the clogs of predetermination, and obstinate, unbending prejudice; while we struggle to resist the force of argument, and wilfully stifle conviction in the birth, we can at best pretend to no more than the mere mockery of investigation.

"From this body, however, I presume this report will meet a better fate. They will weigh it as its importance merits; they will trace it through every labyrinth of its consequences; and while they guard the public welfare from the danger of ill-judged innovation, they will not forget that something is due to humanity, and the great principles of moral justice. Under this impression I shall once more venture to give my sentiments at large upon the propositions of the committee; and I call upon

those who differ from me, to watch every assertion and every argument I advance, and if they can refute the one, or contradict the other, I yield the point for ever.

"I shall not detain you, Sir, with any observations on those parts of the report which prohibit the fraudulent, or compulsory exportation of free blacks or mulattoes, or the exportation of slaves to the West India islands, &c. nor on that clause which recommends the remission of the penalties heretofore inflicted on certain offspring for the mere offence of the parents.

"Who doubts on these points now, will, in all likelihood, doubt for ever.

"I consider them as too evidently proper to need illustration. But there is another part of the report, which gentlemen either do, or affect to think less clear and obvious. This must be considered, because to be acceded to, it only requires to be understood.

"You are called upon to say, Sir, whether the owner of a slave shall be permitted to give him his liberty by a mode of conveyance which he may effectually use (and at a time when it is clearly lawful for him) to transfer the property of that slave to another.

"By an existing law no slave can be manumitted by his master during his last sickness, or at any time by last will and testament; that is when liberty (the great birthright of every human creature) is to be restored to its plundered proprietor, you must be careful to make the restitution at a particular time, and in one specified manner, or your generous intentions shall be frustrated; but if you are desirous of passing any worthless goods and chattels, you may perfect the transfer at any time, and almost in any way.

"The door to freedom is fenced about with such barbarous caution, that a stranger would be naturally led to believe that our statesmen considered the existence of its opposite among us as the *sine qua non* of our prosperity; or, at least, that they regarded it as an act of the most atrocious criminality to raise an humble bondsman from the dust, and place him on the stage of life on a level with their citizens.

"To discover the grounds of their conduct would surely be no easy task; to show that, let them be what they may, an enlighten-

ed legislature should blush to own them, a school boy would have sufficient ability.

“ Sir, iniquitous, and most dishonourable to Maryland, is that dreary system of partial bondage, which her laws have hitherto supported with a solicitude worthy of a better object, and her citizens by their practice countenanced.

“ Founded in a disgraceful traffic, to which the parent country lent her fostering aid, from motives of interest, but which even she would have disdained to encourage, had England been the destined mart of such inhuman merchandise, its continuance is as shameful as its origin.

“ Eternal infamy await the abandoned miscreants, whose selfish souls could ever prompt them to rob unhappy Afric of her sons, and freight them hither by thousands, to poison the fair Eden of liberty with the rank weed of individual bondage! Nor is it more to the credit of our ancestors, that they did not command these savage spoilers to bear their hateful cargo to another shore, where the shrine of freedom knew no votaries, and every purchaser would at once be both a master and a slave.

“ In the dawn of time, when the rough feelings of barbarism had not experienced the softening touches of refinement, such an unprincipled prostration of the inherent rights of human nature would have needed the gloss of an apology; but to the everlasting reproach of Maryland be it said, that when her citizens rivalled the nation from whence they emigrated, in the knowledge of moral principles, and an enthusiasm in the cause of general freedom, they stooped to become the purchasers of their fellow-creatures, and to introduce an hereditary bondage in the bosom of their country, which should widen with every successive generation.

“ For my own part, I would willingly draw the veil of oblivion over this disgusting scene of iniquity, but that the present abject state of those who are descended from these kidnapped sufferers, perpetually brings it forward to the memory.

“ But wherefore should we confine the edge of censure to our ancestors, or those from whom they purchased? Are not we equally guilty? *They* strewed around the seeds of slavery; *we* cherish and sustain the growth. *They* introduced the system; *we* enlarge, invigorate, and confirm it. Yes, let it be handed down to posterity, that the people of Maryland, who could fly

to arms with the promptitude of Roman citizens, when the hand of oppression was lifted up against themselves ; who could behold their country desolated and their citizens slaughtered ; who could brave with unshaken firmness every calamity of war before they would submit to the smallest infringement of their rights—that this very people could yet see thousands of their fellow-creatures, within the limits of their territory, bending beneath an unnatural yoke ; and, instead of being assiduous to destroy their shackles, anxious to immortalize their duration, so that a nation of slaves might for ever exist in a country where freedom is its boast.

“ Sir, it is really matter of astonishment to me, that the people of Maryland do not blush at the very name of Freedom. I admire that modesty does not keep them silent in her cause. That they who have, by the deliberate acts of their legislature, treated her most obvious dictates with contempt ; who have exhibited, for a long series of years, a spectacle of slavery which they still are solicitous to perpetuate ; who, not content with exposing to the world for near a century, a speaking picture of abominable oppression, are still ingenious to prevent the hand of generosity from robbing it of half its horrors ; that *they* should step forward as the zealous partizans of freedom, cannot but astonish a person who is not casuist enough to reconcile antipathies.

“ For shame, Sir ! let us throw off the mask, 'tis a cobweb one at best, and the world will see through it. It will not do thus to talk like philosophers, and act like unrelenting tyrants ; to be perpetually sermonizing it with liberty for our text, and actual oppression for our commentary.

“ But, Sir, is it impossible that this body should feel for the reputation of Maryland ? Is national honour unworthy of consideration ? Is the censure of an enlightened universe insufficient to alarm us ? It may proceed from the ardour of youth perhaps, but the character of my country among the nations of the world is as dear to me as that country itself. What a motley appearance must Maryland at this moment make in the eyes of those who view her with deliberation ! Is she not at once the fair temple of freedom, and the abominable nursery of slaves ; the school for patriots, and the foster-mother of petty despots ; the assertor of human rights, and the patron of wanton oppression ? Here have emigrants from a land of tyranny found an asylum

from persecution, and here also have those who came as right-fully free as the winds of heaven, found an eternal grave for the liberties of themselves and their posterity !

“ In the name of God, should we not attempt to wipe away this stigma, as far as the impressions of the times will allow ? If we dare not strain legislative authority so as to root up the evil at once, let us do all we dare, and lop the exuberance of its branches. I would sooner temporize than do nothing. At least we should show our wishes by it.

“ But lest character should have no more than its usual weight with us (let us examine into the *policy* of thus perpetuating slavery among us) and also consider this regulation in particular, with the objections applicable to each. That the result will be favourable to us I have no doubt.

“ That the dangerous consequences of this system of bondage have not as yet been felt, does not prove they never will be. At least the experiment has not been sufficiently made to preclude speculation and conjecture. To me, Sir, nothing for which I have not the evidence of my senses is more clear, than that it will one day destroy that reverence for liberty which is the vital principle of a republic.

“ While a majority of your citizens are accustomed to rule with the authority of despots, within particular limits ; while your youth are reared in the habits of thinking that the great rights of human nature are not so sacred but they may with innocence be trampled on, can it be expected that the public mind should glow with that generous ardour in the cause of freedom, which can alone save a government like ours from the lurking dæmon of usurpation ? Do you not dread the contamination of principle ? Have you no alarms for the continuance of that spirit which once conducted us to victory and independence, when the talons of power were unclasped for our destruction ? Have you no apprehensions left, that when the votaries of freedom sacrifice also at the gloomy altars of slavery, they will at length become apostates from the former ? For my own part, I have no hope that the stream of general liberty will flow for ever, unpolluted, through the foul mire of partial bondage, or that they who have been habituated to lord it over others, will not in time be base enough to

let others lord it over them. If they resist, it will be the struggle of *pride* and *selfishness*, not of *principle*.

"There is no maxim in politics more evidently just, than that laws should be relative to the principle of government. But is the encouragement of civil slavery, by legislative acts, correspondent with the principle of a democracy? Call that principle what you will, the love of *equality*, as defined by some; of *liberty*, as understood by others; such conduct is manifestly in violation of it.

"To leave the principle of a government to its own operation, without attempting either to favour or undermine it, is often dangerous; but to make such direct attacks upon it by striking at the very root, is the perfection of crooked policy. Hear what has been said on this point, by the noblest instructor that ever informed a statesman.

"'In despotic countries,' says Montesquieu, 'where they are already in a state of *political slavery*, civil slavery is more tolerable than in other governments. Every one ought there to be contented with necessities and with life. Hence the condition of a slave is hardly more burthensome than that of a subject. But in a monarchical government, where it is of the utmost consequence that human nature should not be debased or dispirited; there ought to be no slavery. In *democracies*, where they are all upon an equality, and in aristocracies, where the laws ought to endeavour to make them so, as far as the nature of the government will permit, slavery is contrary to the spirit of the constitution; it only contributes to give a power and luxury to the citizens which they ought not to possess.'

"Such must have been the idea in England, when the general voice of the nation demanded the repeal of the statute of Edward VI. two years after its passage, by which their rogues and vagabonds were to be enslaved for their punishment. It could not have been compassion for the culprits that excited this aversion to the law, for they deserved none. But the spirit of the people could not brook the idea of bondage, even as a penalty judicially inflicted. They dreaded its consequences; they abhorred the example: in a word, they revered public liberty, and hence detested every species of slavery.

"Sir, the thing is impolitic in another respect. Never will your country be productive; never will its agriculture, its commerce,

or its manufactures flourish, so long as they depend on reluctant bondsmen for their progress.

“ ‘ Even the very earth itself,’ (says the same celebrated author) ‘ which teems profusion under the cultivating hand of the free-born labourer, shrinks into barrenness from the contaminating sweat of a slave.’ This sentiment is not more figuratively beautiful than substantially just.

“ Survey the countries, Sir, where the hand of freedom conducts the ploughshare, and compare their produce with yours. Your granaries in this view appear like the store-houses of emnets, though not supplied with equal industry. To trace the cause of this disparity between the fruits of a freeman’s voluntary labours, animated by the hope of profit, and the slow-paced efforts of a slave, who acts from compulsion only ; who has no incitement to exertion but fear ; no prospect of remuneration to encourage, would be insulting the understanding. The cause and the effect are too obvious to escape observation.

“ Hence, Mr. Speaker, instead of throwing obstacles and discouragements in the way of manumissions, prudence and policy dictate that no opportunity should be lost of multiplying them, with the consent of the owner.

“ But objections have heretofore been made, and I suppose will be reiterated now, against the doctrine I am contending for.

“ I will consider them. It has been said ‘ that freed-men are ‘ the convenient tools of usurpation ;’ and I have heard allusions made to history for the confirmation of this opinion. Let, however, the records of ancient and modern events be scrutinized, and I will venture my belief, that no instance can be found to give sanction to any such idea.

“ In Rome it was clearly otherwise. We have the evidence of Tiberius Gracchus, confirmed by Cicero, and approved by Montesquieu, that the incorporation of the freed-men into the city tribes, re-animated the drooping spirit of democracy in that republic, and checked the career of Patrician influence.

“ So far, therefore, were properly-made emancipations from contributing to the downfall of Rome, that they clearly served to procrastinate her existence, by restoring that equipoise in the constitution which an ambitious aristocracy were perpetually labouring to destroy.

“ How much more rational, Mr. Speaker, would it be to argue that slaves are the fit machines by which an usurper might effect his purposes ! and there is, therefore, nothing which a free government ought more to dread than a diffusive private bondage within its territory.

• “ A promise of manumission might rouse every bondsman to arms, under the conduct of an aspiring leader ; and invited by the fascinating prospect of freedom, they might raise such a storm in Maryland as it would be difficult to appease. Survey the conduct of the slaves who fought against Hannibal in the second Punic war. Relying on the assurances of the Senate, who had embodied them with the Roman legions, that conquest should give them liberty, not a man disgraced himself by flight ; but though new, perhaps, to the field of battle, they contended with the resolution of veterans. With the same promptitude and intrepidity would they have turned their arms against the Senate themselves, if the same assurances had been given them by enterprising citizens, who sought their destruction from motives of ambition or revenge. The love of liberty is inherent in human nature. To stifle or annihilate it, though not impossible, is yet difficult to be accomplished. Easy to be wrought upon, as well as powerful and active in its exertions, wherever it is not gratified there is danger. Gratify it, and you ensure your safety. Thus did Sylla think, who, before he abdicated the dictatorship, gave freedom to ten thousand slaves, and lands to a number of legions. By these means was he enabled, notwithstanding all his preceding enormities, to live unmolested as a private citizen in the bosom of that very country where he had acted the most hateful deeds of cruelty and usurpation. For, by manumitting these slaves, the usurper secured their fidelity and attachment for ever, and disposed them to support and revenge his cause at every possible hazard. Rome knew this, and therefore Sylla was secure in his retirement.

“ This example shows that slaves are the proper, natural implements of usurpation, and therefore a serious and alarming evil in every free community. With much to hope for by a change, and nothing to lose, they have no fears of consequences. Deprived of their rights by the acts of government and its citizens, they have no checks of pity or of conscience, but are stimulated by the desire of revenge, to spread wide the horrors of desolation,

and to subvert the foundations of that liberty of which they have never participated, and which they have only been permitted to envy in others.

“But where slaves are manumitted by government, or in consequence of its provisions, the same motives which have attached them to tyrants, when the act of emancipation has flowed from them, would then attach them to government. They are then no longer the creatures of despotism. They are bound by gratitude, as well as by interest, to seek the welfare of that country from which they have derived the restoration of their plundered rights, and with whose prosperity their own is inseparably involved. An apostacy from these principles, which form the good citizen, would, under such circumstances, be next to impossible. When we see freed-men scrupulously faithful to a lawless, abandoned villain, from whom they have received their liberty, can we suppose that they will reward the like bounty of a free government with the turbulence of faction, or the seditious plots of treason? He who best knows the value of a blessing, is generally the most assiduous in its preservation; and no man is so competent to judge of that value, as he from whom the blessing has been detained. Hence the man that has felt the yoke of bondage must for ever prove the assertor of freedom, if he is fairly admitted to the equal enjoyment of its benefits.

“To show, Sir, that my idea of the danger arising from the number of slaves in a free government is no novelty in politics, permit me once more to read a passage from Montesquieu.

“‘The multitude of slaves is no grievance in a despotic state, where the *political* slavery of the whole body takes away the sense of *civil* slavery. But in *moderate* states it is a point of the highest importance that there should not be a great number of slaves. The *political* liberty of these states adds to the value of *civil* liberty, and he who is deprived of the latter is also deprived of the former. He sees the happiness of a society of which he is not so much as a member; he sees the security of others fenced by laws, himself without any protection. He sees his master has a soul that can enlarge itself, while his own is constrained to submit to a continual depression. Nothing more assimilates a man to a beast than living among freemen, himself a slave. Such people as these are the natural enemies of society, and their numbers must be dangerous.’

"Not gradual emancipations, therefore, but the extension of civil slavery, ought to alarm us; and in truth we are the only nation upon earth that ever considered the first as a ground of apprehension, or the last as a political desideratum.

"In England, while bondage existed among that enlightened people, enfranchisements were always encouraged by Parliament, and those who were entrusted with the administration of justice; and throughout all Europe indeed, after the introduction of Christianity, the gloom of civil slavery gradually receded, as their horizon was enlightened by the dawn of political liberty. Even in India, where climate and the nature of the country have of necessity established a political despotism, their slaves are manumitted without difficulty. No legislative restrictions to observe! No tyrannic clogs to struggle with! These were reserved for that unhallowed æra when the rulers, in a republic produced by the perfection of human reason, should forget the principles of their constitution, of that religion they profess, of the eternal laws of nature, nay, the suggestions of common prudence. When Eastern despots surpass us in humanity, when India affords an evidence of justice which Maryland hesitates to exhibit, who does not lament the corruption of that generous spirit whose exertions so lately attracted the attention of an admiring universe!

"But it has also been said (and who knows but the same opinion may still have its advocates!) "that nature has black-balled these wretches out of society."

"Gracious God! can it be supposed that thy almighty Providence intended to proscribe these victims of fraud and power from the pale of society, because thou hast denied them the delicacy of an European complexion! Is this colour the mark of divine vengeance, or is it only the flimsy pretext upon which we attempt to justify our treatment of them? Arrogant and presumptuous is it thus to make the dispensations of Providence subservient to the purposes of iniquity, and every slight diversity in the works of nature the apology for oppression. Thus acts the intemperate bigot in religion. He persecutes every dissenter from his creed in the name of God, and even rears the horrid fabric of an inquisition upon heavenly foundations.

"I like not these holy arguments. They are as convenient for the tyrant, as the patriot; the enemy, as the friend of mankind. Contemplate this subject through the calm medium of philosophy,

and then to know that these shackled wretches are men as well as we are, sprung from the same common parent, and endued with equal faculties of mind and body, is to know enough to make us disdain to turn casuists on their complexions, to the destruction of their rights. The beauty of a complexion is mere matter of taste, and varies in different countries, nay, even in the same; and shall we dare to set up this vague, indeterminate standard, as the criterion by which shall be decided on what complexion the rights of human nature are conferred, and to what they are denied by the great ordinances of the Deity? As if the Ruler of the universe had made the darkness of a skin, the flatness of a nose, or the wideness of a mouth, which are only deformities or beauties, as the undulating tribunal of taste shall determine, the indicia of his wrath.

“ Sir, it is pitiable to reflect on the mistaken light in which this unfortunate generation are viewed by the people in general. Hardly do they deign to rank them in the order of beings above the mere animal that grazes the field of its owner. That an humble, dusky, unlettered wretch that drags the chain of bondage through the weary round of life, with no other privilege but that of existing for another’s benefit, should have been intended by heaven for their equal, they will not believe. But let me appeal to the intelligent mind, and ask in what respect are they our inferiors? Though they have never been taught to tread the paths of science, or embellish human life by literary acquirements; though they cannot soar into the regions of taste and sentiment, or explore the scenes of philosophical research, is it to be inferred that they want the power, if the yoke of slavery did not check each aspiring effort, and clog the springs of action? Let the kind hand of an assiduous care mature their powers, let the genius of freedom excite to manly thought and liberal investigation, we should not then be found to monopolize the vigour of fancy, the delicacy of taste, or the solidity of scientific endowments. Born with hearts as susceptible of virtuous impressions as our own, and with minds as capable of benefiting by improvement, they are in all respects our equals by nature; and he who thinks otherwise has never reflected, that talents, however great, may perish unnoticed and unknown, unless auspicious circumstances conspire to draw them forth, and animate their exertion in the round of knowledge. As well might you expect to see the

bubbling fountain gush from the burning sands of Arabia, as that the inspiration of genius or the enthusiastic glow of sentiment should rouse the mind which has yielded its elasticity to habitual subjection. Thus the ignorance and the vices of these wretches are solely the result of situation, and therefore no evidence of their inferiority. Like the flower whose culture has been neglected, and perishes amidst permitted weeds ere it opens its blossoms to the spring, they only prove the imbecility of human nature unassisted and oppressed. Well has Cowper said,

“ ‘Tis liberty alone which gives the flower
 “ Of fleeting life its lustre and perfume,
 “ And we are weeds without it.”

“ Again, it has been urged, ‘ that manumitted slaves will be, ‘ as in many instances they have been, nuisances in the community.’ I know not of instances of this kind in number sufficient to justify a general interference to the prejudice of the blacks : but even if they exist, the argument has no weight, for it is founded on what is not *peculiar* to those people, but, from an imperfect administration of criminal justice, is equally applicable to their whiter neighbours. Will any one pretend that they alone merit this imputation? Extend it to your white citizens in the same proportion, and you will not censure uncharitably. I would not give a straw to choose between ~~them~~. That many of them will be idle, and roguishly inclined, is certain, but they will be kept in countenance. That the majority will be honest and industrious is as probable as the contrary. I would trust them as soon as the great body of your people ; in general, sooner ; because the plain, simple method of life to which they have been accustomed, supersedes the necessity of much, and the little they want, their habits of labour will render it easy to supply ; and because the terror of the law operates stronger upon their minds than on the minds of those who have been long hackneyed in the world. They have also the same inducement to industry with others, and I see no reason for supposing they will be lazier.

“ Thus have I anticipated and answered such objections as have come to my knowledge, against manumission in general. A variety have also been started to this particular mode. These too shall be examined.

"As to such as respect superannuated slaves, and the injury to creditors, the bill may contain the remedy. Let the bequest be considered in the nature of a *specific legacy*, to depend on the fact of assets; and let all manumissions of slaves above fifty years old, be declared void, and the executors bound to indemnify the county.

"But another objection occurs, which may deserve a more particular reply, because against that there can be no adequate provision. 'Testators may impoverish their families by inconsiderate manumission in their last sickness. They may be frightened by preachers, refined moralists, and others, when the mind is easily alarmed and incapable of its usual resistance.' I answer, Sir, that if emancipations can be effected *with the owner's consent*, while his understanding is legally competent to the act, I care not through what medium, fraud excepted. Should he reduce his family to beggary by it, I should not be the one to repine at the deed. I should glory in the cause of their distress, while I wished them a more honest patrimony. Sir, the children have no claim to the property of the parent, except as the law casts it on them; and, therefore, you violate no rule of moral justice in allowing him to transfer it in his lifetime. You permit their claim to be barred by the will of the ancestor in every instance but this; an instance which deserves more to be within the rule than any other that can be mentioned, because the property, being founded in iniquity, cannot be too easily defeated. But I much fear that this common apprehension will not be verified in practice. Families will take care that these preachers shall have as little access as possible to the person from whom they have expectations. They will not permit him, if they can avoid it, to close his life with the noblest act of justice that can dignify the man or characterize the Christian. The importunate zealot will have less employment than is expected; less than I wish him.

"We have also been told 'that manumissions by last will may produce the untimely death of the maker. Slaves, knowing that they are provided for in the will, may destroy their master to prevent a revocation, and hasten the completion of the bequest.' 'Tis strange to tell, but I have known this objection relied on; and yet it is plain that it applies with equal force to

every devise whatsoever, let the subject be what it may, or the devisee as white as the snows of heaven. Who is there can discriminate? I wish to hear a distinction attempted. I would draw one myself if I was able.

“Once more, it has been alleged, ‘that such humane provisions in favour of slaves will diminish their value, by rendering them turbulent, disobedient, and unruly.’ Far different was the idea of a man whose name and whose opinions cannot be too often repeated; a man whose greatness of soul, and profound discernment, beaming in every page of his works, have deservedly acquired him the admiration of his cotemporaries and posterity. I mean Montesquieu. Let those who hold this opinion read the *Spirit of Laws*, with their understandings open to conviction, and if they still retain this sentiment, I shall despair of producing their conversion. And yet, Sir, I cannot help remarking, that greatness and humanity are the parents of conciliation; but stubbornness and obstinacy are the effects of causeless barbarity. The more mild and equitable our laws upon this subject, the easier the situation of our slaves. And can it be believed, that to better their situation will make them more discontented with it?—Is it probable that to abolish one sad consequence of their bondage, will give additional weight to their shackles? Is the spirit of acquiescence known only in the gloomy regions of despair; or is it rather to be found where the cheerful rays of hope diffuse their soothing influence? Look back for examples to the republics of Athens and of Sparta. Never did the sedition of her slaves disturb the tranquillity of the former; because the lenity, the justice of her regulations with respect to them, precluded the possibility of a murmur. But the slaves of Sparta made that republic a perpetual scene of commotion, because in considering them as *slaves*, the republic forgot that they were *men*. In addition to these observations, it may be remarked, that the law in question has not always existed in this State; and who is it will contend that our slaves are more tractable now than before its passage? In Pennsylvania, where they have gone to a prodigious extent towards the total abolition of slavery, have they felt these evils at which gentlemen affect to be so alarmed?

"I have heard of no objections, except those I have already noticed, against the report upon the table, and I can foresee no more. If there are any not yet stated, I request the enemies to this measure to disclose them now. I offer myself ready to answer them, or to yield to be a proselyte to their opinion if I cannot.

"Here then, Sir, let the subject rest with the House, upon its obvious merits. What will be their determination, I know not. What it ought to be, I have, at present, no doubt. You are not called upon, at this time, to compel an emancipation of your slaves. For such a measure I am no advocate, however proper it might be upon principle, or if the temper of the people would allow it (for there are times when the best laws cannot with propriety be enacted).—Thus stands the question at present. A former legislature has created a barrier to the course of voluntary liberation. They have forbid a manumission by last will and testament, or in any manner during the last sickness of the owner: a time when the heart is most powerfully disposed to be generous and just. They have destroyed almost the only opportunity these wretches can have of regaining the station to which God and nature have given them a title. They have thrown up an insuperable mound against the gentle current of humanity, to the additional injury of those whom they had already injured beyond the reach of justification. All this they have done without one rational inducement; without even policy to plead in its extenuation. Will you, then, whose councils the breath of freedom has heretofore inspired; whose citizens have been led by Providence to conquests as glorious as unexpected, in the sacred cause of human nature; whose government is founded on the never-mouldering basis of equal rights; will you, I say, behold this wanton abuse of legislative authority; this shameful disregard of every moral and religious obligation; this flagrant act of strained and unprovoked cruelty, and not attempt redress, when redress is so easy to be effected?

"Often, Mr. Speaker, has the public treasure relieved the wants of suffering merit, when the bounty of government was hardly reconcileable with justice; but you have now submitted to your consideration a case where the finer feelings of benevolence may

be gratified, and right and justice add their sanction to the measure, while the community sustains no damage. Yours, too, will be the gratitude of the millions whom this day's vote may give to breathe the air of freedom; yours the flattering approbation of the friends of mankind; and yours the pleasing consciousness of having, under the influence of every nobler sentiment, unloosed the manacles of many a fellow-creature, and led him by the hand to LIBERTY and SOCIAL HAPPINESS!"

In 1792, Mr. Pinkney was elected a member of the Executive Council of Maryland, and continued in that station until November, 1795, when being chosen a delegate to the Legislature from Anne Arundel county, he resigned his seat at the Council Board, of which he was at that time President.

During all this period he continued indefatigably devoted to his professional pursuits, and gradually rose to the head of the bar, and to a distinguished rank in the public councils of his native State. "His acuteness, dexterity, and zeal in the transaction of business; his readiness, spirit, and vigour in debate; the beauty and richness of his fluent elocution, adorned with the finest imagery drawn from classical lore and a vivid fancy; the manliness of his figure and the energy of his mein, united with a sonorous and flexible voice, and a general animation and graceful delivery,"* were the qualities by which he attained this elevated standing. But there remain no other memorials of his professional character at this period of his life than such as have been

* Mr. Walsh.

preserved in the fleeting recollection of his contemporaries, in the written opinions which he gave upon cases submitted to him as counsel, and in the books of law reports. It is, however, obviously impossible to form any adequate notion of the powers of an advocate from the concise sketches of the arguments of counsel contained in the books of reports. But an argument which he delivered in 1798 upon the question whether the statute of limitations is a bar to the issue of tenant in tail, (which will be found reported in the 3d volume of Harris and M'Henry's Reports, p. 270,) may be referred to as a specimen of the accuracy and depth of his legal learning, and of his style and peculiar manner of reasoning upon technical subjects.

In 1796, he was selected by President Washington as one of the Commissioners on the part of the United States, under the 7th article of Mr. Jay's treaty with Great Britain. After consultation with his friends, he reluctantly determined to accept this appointment, which had been spontaneously tendered to him. He accordingly embarked for London with his family, where he arrived in July, 1796, and was joined by Mr. Gore, the other Commissioner on the part of our government. The Board having been organized by the addition of Dr. Nicholl and Dr. Swabey as British Commissioners, and of Colonel Trumbull, (a citizen of the United States appointed by lot,) proceeded to examine the claims brought before it. Various interesting questions arose,

in the course of this examination, respecting the law of contraband, domicile, blockade, and the practice of the prize courts, which were investigated and discussed with great learning and ability. Mr. Pinkney's written opinions delivered at the Board, which are subjoined in the Second Part of this publication, will, I think, be found to be finished models of judicial eloquence, uniting powerful and comprehensive argument, with a copious, pure, and energetic diction.*

He was also engaged, during his residence abroad, in attending to the claim of the State of Maryland for a large amount of public property invested in the stock of the Bank of England before the revolution, and which had become the subject of a complicated Chancery litigation. He at last succeeded in extricating the stock from this situation by an arrangement under which it was (with his consent) adjudged to the crown, with an understanding that after the payment of the liens upon it, the balance should be paid over to the government of Maryland.

The following extracts from letters to his elder brother, will show the nature of Mr. Pinkney's occupations and pursuits during his residence in England.

"LONDON, 26th August, 1796.

"DEAR J.,—We are now London house-keepers. I found it would not answer to take lodgings unless we meant to do penance instead of being comfortable. Our present residence

* See PART SECOND, No. I.

is merely temporary. I have taken a short lease of a new house in Upper Guilford-street, No. 5, to which we shall remove in about six weeks. The situation is airy, genteel, and convenient enough to the Commissioners' office. We are compelled to live handsomely, to avoid singularity; but our view is still to be as economical as the requisite style of living will admit. We do not and shall not want for the most respectable and agreeable society. The American families here are on the most friendly and intimate footing with us, and we have as many English acquaintances as we desire. In short, we may pass our time here (for a few years to come) with considerable satisfaction—not so *happily*, indeed, as at Annapolis, but still with much comfort and many gratifications. My health is apparently bettered, and Mrs. P. is evidently mending,—but we have not yet had sufficient experience of the climate to be able to conjecture its future effects on us. The child continues well.

“Our namesake (the late American minister) is an amiable man. We have been much with him, and have received from him every possible attention. He unites with an excellent understanding, the most pleasing manners, and is at once the man of sense, and the polished gentleman. Every body speaks well of him, and deservedly. There is no doubt of our relationship. His family came from the North—I think from Durham, where he tells me he still has relations. The loss of his wife appears to have affected him deeply, and has doubtless occasioned his anxiety to return to America. He leaves us soon, and I am sorry that he does so.

“Yesterday we appointed the fifth Commissioner *by lot*. He is an *American* (Colonel John Trumbull,) and was Secretary to Mr. Jay, when envoy at this court. I made the draft. We all qualified this morning before the Lord Mayor, and shall commence business very soon. Every thing in relation to the commission wears *at present* a favourable aspect, and I have new expectations of being able to return to my friends within a period much shorter than I had ventured to hope for.

“2d Sept. 1796. P. S. Your letter of the 26th June has just reached me. Be assured that nothing can diminish my attachment to Annapolis. I have nothing to complain of from the inhabitants—on the contrary, they have done me honour beyond

my merit. I feel the worth of their attentions, and shall never lose the grateful recollection of them. They have treated me with flattering and friendly distinctions, and I will never give them cause to regret it. In a word, the hope of once more becoming an inhabitant of my native city forms one of my greatest pleasures. If I cannot be happy there, I cannot be happy any where. If I were to settle in any other place, interest, not inclination, must give rise to it. I know not where the wish of procuring a competence may hereafter fix me; but if that competence can be obtained at Annapolis, there will I labour for it.

"I intended to have written to Mr. James Williams, but have been so much interrupted and engaged as not to be able to do so. Indeed I have no subject for a letter but what is exhausted in this. His friendly offices on the eve of my departure, proved the goodness of his heart, and made a deep impression on mine. Let me be remembered to him in the warmest terms. I will write to all my friends in due time—and in the interim tell them to write to me—a letter is now of real value to me.

"Sept. 18th. P. S. I missed the opportunity of sending my letter, and do not now know when I shall have another.

"The shooting season began here the 15th inst., but I have not yet had a gun in hand. I envy Dr. Sheaff the sport he will have in the neighbourhood of Annapolis. There can be none in this country to equal it.

"Adieu—if I keep my letter by me much longer, it will become a volume of postscripts.

"October 14th. I have just got yours of the 14th Aug. It is kind in you to write thus often. Persevere in a practice so well begun, and you will oblige me highly. The Commissioners commenced business the 10th inst. I was presented to the King on Wednesday last at St. James's. It was necessary, and I am glad it was, for while I am here I wish to see as much as possible. I was in the House of Lords at the opening of Parliament, and heard his Majesty deliver his speech—but I was not able to hear the debate upon it in the House of Commons, as I wished to do. I have attended the theatre pretty often, and have seen all their great performers. Be assured that we are accustomed in America to rate their excellence too high. There is

hardly an exhibition in London which report does not exaggerate to us. I was led to expect more than I have been able to find. There are subjects, however, upon which I have not been disappointed—the beauty and flourishing appearance of the country—the excellence of the roads—the extent and perfection of their various manufactures—the enormous stock of individual wealth which town and country exhibits, &c. &c. cannot be too strongly anticipated.”

“LONDON, 26th April, 1799.

“DEAR J.,—I have received your letter of the 4th of March, enclosing one for Mr. Trumbull—but that of the 17th of April, covering a duplicate of Trumbull’s letter, I have not received. Mr. T. has charged me with his thanks for your attention—and will, I presume, write to you himself.

“I am grieved by the style of your letter. If I have neglected you, it has not been from want of affection or forgetfulness of what I owe to your worth. I did not know that it would be acceptable to you to hear very often or very fully from me ; and if on that account I have sometimes made you trust to others for tidings of me, and at other times have written rather scantily on subjects that might have been interesting to you, I ask to be forgiven.

“To say the truth, a long letter of a merely friendly complexion is not easily made. It would be idle to give you in such a letter the news of the moment, for the news would cease to be so before the letter could reach you ; and I should fatigue you to death if I were to doom you to read accounts of London amusements, or of the manner in which I pass my time. Such details would soon have no novelty to recommend them, and would lose all attraction.

“I have seen in this country, and continue to see, much that deserves the attention of him that would be wise or happy ; but I would prefer making all this the subject of *conversation*, when Providence shall permit us to meet again, to putting it imperfectly on paper for your perusal when we are separated. There is not perhaps a more dangerous thing for him who aims at consistency, or at least the appearance of it, than to hasten to record

impressions as they are made upon his mind by a state of things to which he has not been accustomed, and to give that record out of his own possession. I have made conclusions here, from time to time, which I have afterwards discarded as absurd ; and I could wish that some of these conclusions did not show themselves in more than one of the letters I have occasionally written to my friends. I have made false estimates of men and things, and have corrected them as I have been able ; in this there was nothing to blush for, for who is there can say he has not done the same ?—But I confess that I do feel some little regret, when I remember that I have sent a few (though to say the truth, *very few*) of those estimates across the Atlantic, as indisputably accurate, and have either deceived those to whom they were sent, or afforded them grounds for thinking me a precipitate or superficial observer. The consciousness of this has indisposed me to a repetition of similar conduct ; and I have desired so to write in future as to be able to change ill-founded opinions without the hazard of being convicted of capriciousness or folly. You will observe that I am all this time endeavouring to make my peace with you on the score of your complaint of negligence ; but after all, I must in great measure rely upon your disposition to bear with my faults, and to overlook those you cannot fully acquit. I must not, however, omit to state my belief that you do not receive all the letters I send you, and of course that I appear to you more culpable than I really am.

“ I wish I could tell you when I shall be likely to see you ; although my time passes in a way highly gratifying, I am anxious to return. Our acquaintance has lately very much enlarged itself, and our situation is altogether peculiarly pleasant for foreigners ; but I sigh now and then for home. I am told that I am considerably altered since I came here, and I incline to think there is some foundation for it ; but I shall not grow much wiser or better by a longer stay. I am become familiar with almost every thing around me, and do not look out upon life with as much intentness of observation as heretofore, and of course I am now rather confirming former acquisitions of knowledge than laying in new stores for the future—I begin to languish for my profession—I want active employment. The business of the

commission does not occupy me sufficiently, and visiting, &c. with the aid of much reading, cannot supply the deficiency. My time is always filled in some way or other; but I think I should be the better for a speech now and then. Perhaps another twelvemonth may give me the opportunity of making *speeches* till I get tired of them—and tire others too.

“ There are some respects in which it may be better that I should remain here a little longer; my health, though greatly mended, is still delicate—I *look* better than I *am*; and perhaps a summer at *Brighton* or *Cheltenham* may make me stronger. The last winter has been unfavourable to me, by affecting my stomach severely, and I have at this moment the same affection in a less degree, accompanied with a considerable head-ach. I ought to have good health, for I take pains to acquire it; and have even gone so far as to abandon the use of tobacco, to which I was once a slave.—It is now about eighteen months since I have tasted this pernicious weed; but I did not forbear the use of it solely on account of my health; I found that it was considered here as a vulgar habit, which he who desired society must discard.”

“ LONDON, 14th February, 1800.

“ DEAR J.,—It is now so long since I have had a line from you, that I must conclude I have been unlucky enough to give you offence for which it is necessary I should atone. What it can be I have no means of conjecturing; but let it be what it may, you ought to believe that it has been wholly accidental. You complained to me some time ago that I was a negligent correspondent; I explained the cause, and asked to be forgiven. If that explanation did not satisfy you, at least my prayer of pardon had some claim to be well received. I think I know you so well that I may venture to be certain you are not still angry with me for the *old* reason. There must be some *new* ground of exception. Let me know it, I entreat you, and I will make amends as far as I am able. I had indeed hoped that it would not be for ordinary matters that you would forget my claims to your *friendship*, if not your *affection*. I had supposed that you would not lightly have been induced to treat me as a stranger; and to

substitute the cold intercourse of ceremony for that of the heart. Why will you allow me to be disappointed in expectations so reasonable, and so justly founded on the natural goodness of your disposition, and the soundness of your understanding? Can you imagine that I do not recollect how much I am indebted to your kindness on various occasions, and how strong is your title to my attachment and respect? If I have appeared to slight your letters by sometimes giving them short answers, and sometimes delaying to give them any, can you think so meanly of me as to suppose that therefore I have not placed a proper value on them and you? I declare to God that if you have made this supposition, you have been unjust both to yourself and me. There is not a person on earth for whom I have a more warm and sincere regard, nor is there one whose correspondence, while you permitted it to last, was more truly grateful to me. I beg you, therefore, to resume it, and to resume it cordially.—But if, after all, you are so different from yourself as to persist in regarding me as one who has no better ties upon you than the rest of the world, at least tell me why it is that this must be so.

“Of the late revolution in France and of Bonaparte’s advances to negotiation, with the rejection of these advances, you will have heard before this can reach you. I was present very lately in the House of Commons at the debate on the rejection of these overtures. So able and eloquent a speech as Mr. Pitt’s on that occasion, I never witnessed. Experience only can decide how far the conduct he vindicated was wise. Administration have undoubtedly sanguine hopes of restoring the House of Bourbon; and prodigious efforts will be made during the next campaign with that object. I do not think this will succeed. The co-operation of Russia still remains equivocal; but even if Russia should give all her strength to the confederacy, it will not have power to force upon France the ancient dynasty of that country with all the consequences inseparable from it. The present government of that ill-fated nation is a mockery—a rank usurpation by which political freedom is annihilated; but it is a government of energy, and will be made yet more so by an avowed attempt to overturn it by a foreign army in favour of the exiled family. This is my opinion; but the war in Europe has

so often changed its aspect against all calculation that prophecies about its future results, are hardly worth the making. The death of General Washington has ascertained how greatly he was every where admired. The panegyrics that all parties here have combined to bestow upon his character have equalled those in America.

"P. S. As our commission is at a stand on account of the disagreements under the American commission, I can form no guess as to the probable time of my return. There is little prospect, however, of its being very soon. I must be patient, and am determined to *see it out*; but I wish most ardently to revisit my country and my friends. I think it likely that my brother Commissioner, Gore, will take a trip to America next summer, and come back in the course of the autumn. I am afraid we shall both have *leisure enough* for a voyage to the East Indies. I have nothing to do here but to visit, read, write, and so forth—In this idle course I certainly grow older and perhaps a little wiser; but I am doing nothing to expedite my return.

"Pray can you make out to send me a box of Spanish cigars? If you can, I will thank you; for I find it beneficial to smoke a cigar or two before I go to bed. This I do by stealth, and in a room devoted to that purpose; for smoking here is considered a most ungentlemanlike practice. Having left off chewing tobacco, which was prejudicial to me, I have taken up the habit of smoking to a very limited extent in lieu of it; and as I find it serviceable to me, and *nobody knows it*, I think I shall continue it. Remember me affectionately to Ninian, and tell him I mean to write to him soon. Mrs. Pinkney hears that William is able to write something like a letter. If this be so, she begs you will request Ninian to make him write to her." * * * * *

"LONDON, August 27th, 1800.

"DEAR J.,—I received your letter of the 27th May, while in the country, and delayed answering it till my return to town. For your good intentions relative to the cigars, I am much obliged to you, and I heartily wish it was in my power to thank you for the *cigars themselves*, of which I have heard nothing otherwise than in your letter. Perhaps I may still get them—but I have

not much hopes. Make my acknowledgments to Mr. Williams for the box you speak of as being a present from him. As there is no person for whom I feel a more warm and sincere regard, and upon whose friendship I more value myself, you may be assured that this little proof of his recollection, gives me the greatest pleasure. I shall not easily forget the many kind attentions I have received from him—nor can ever be more happy than when an opportunity shall occur of showing the sense I entertain of them.

“Whether the justification you offer for ceasing to write me is a sound one or not, it is not worth while to inquire. You have written at last, and this puts out of the question all past omissions. Perhaps we have been both to blame—or perhaps the fault has been wholly mine. I will not dispute with you on this point, but I entreat that in future it may be understood between us that trifles are not to be allowed to bring into doubt our regard for each other, and that our intercourse is not to be regulated by the rules of a rigorous ceremony. While I admit what you urge in regard to my neglect of *you*, I take leave to enter my protest in the strongest terms against the general charge made in your letter that I have neglected several others in the same way. I have had no correspondent in America (I have already excepted *you*) who has not generally been in my debt. The truth is, my friends have overlooked me in a strange way—and I have been compelled to jog their memories more than perhaps I ought to have done. As to Ninian, you know very well that in writing to you I considered myself as writing to him; for I did not imagine it was desirable that I should make two letters, which should be little more than duplicates, when one would serve just as well. But since I have discovered that Ninian wished me to write to him, I have taken pleasure in doing so—and for some time past, I think he has no cause to complain of me on this score. * * *

“It is my most earnest wish to return home without loss of time, and to apply in earnest to my profession for the purpose of securing, while my faculties are unimpaired, a competence for my helpless family. For several months past I have thought of desiring from my government to be recalled, and if the prospect of our resuming our functions does not greatly change for the better be-

fore next spring, I shall undoubtedly have recourse to this step. At present, it is not practicable to form even a conjecture upon this subject. We have been stopped by the difficulties that have occurred under the 6th article of the treaty, and not by any thing depending on ourselves, or connected with our own duties. If we had not been thus arrested in our progress, we should have finished ere now, or at farthest by Christmas, to the satisfaction of all parties. The arrangement under the 6th article will be accomplished, I am afraid, very slowly, if at all—and even when that arrangement shall be made, the execution of it will demand several years; and we are not, it seems, to outstrip the advances it shall make. Thus it is probable that I shall grow old in this country, unless I resign. In short, I see very little room to doubt that I shall be driven to this expedient. So much for the mismanagement and folly of other people!

“The commission in America has been wretchedly bungled. I am entirely convinced that with discretion and moderation a better result might have been obtained; be this as it may, it is time for me to think seriously of revisiting my country, and of employing myself in a profitable pursuit. I shall soon begin to require ease and retirement; my constitution is weak, and my health precarious. A few years of professional labour will bring me into the *sear and yellow leaf of life*; and if I do not begin speedily, I shall begin too late. To commence the world *at forty* is indeed dreadful; but I am used to adverse fortune, and know how to struggle with it; my consolations cannot easily desert me—the consciousness of honourable views, and the cheering hope that Providence will yet enable me to pass my age in peace. It is not of small importance to me that I shall go back to the bar cured of every propensity that could divert me from business—stronger than when I left it—and I trust, somewhat wiser. In regard to legal knowledge, I shall not be worse than if I had continued; I have been a regular and industrious student for the last two years, and I believe myself to be a much better lawyer than when I arrived in England. There are other respects too, in which I hope I have gained something—how much, my friends must judge. But I am wea-

rying you with prattle about myself, for which I ask you to excuse me.

* * * * "I received Ninian's letter by Mr. Gore, but have not now time to answer it. I wrote him very lately. Request him to get from Mr. Vanhorne the note-book, or note books I lent him, and to take care of them for me. In one of my note books I made some few reports of General Court and Chancery decisions. Let it be taken care of. When I write again, I hope to be able to state when it is probable I shall have a chance of seeing you. When I do return, it is my present intention to settle at Annapolis, unless I go to the federal city. No certainty yet of peace—but I continue to prophesy (notwithstanding the Emperor of Russia's troops) that a *Continental* peace will soon take place. The affair between this country and Denmark will probably be settled by Denmark's yielding the point. I have no opinion of the armed neutrality so much talked of. It could do nothing *now*, if it were formed—but I doubt the fact of its formation."

The following is extracted from a letter to his brother, Mr. Ninian Pinkney, dated July 21st, 1801.

* * * * *

"Report has certainly taken great liberties with my letter to Mr. Thompson. Undoubtedly I have never written to any person sentiments that go the length you state. When the contest for President was reduced to Mr. Jefferson and Mr. Burr, my judgment was fixed that the former ought to be preferred—and I went so far as to think that his superiority in every particular that gives a title to respect and confidence, was so plain and decided as to leave no room for an impartial and unprejudiced man to hesitate in giving him his voice. Of course it is probable that in reference to the result of this competition, when it was known, I have expressed myself in some of my letters to my friends as highly pleased, and that before it was known, I expressed my wishes that the event might be such as it has been. It is highly

probable too that, even before the contest was brought to this alternative, I have said that, whatsoever may have been my wishes, I felt no alarms at the idea of Mr. Jefferson's success. I do not remember that I *have* said thus much, but I believe it to be likely, because it would have been true.

"I have at all times thought highly of Mr. Jefferson, and have never been backward to say so. I have never seen, or fancied I saw, in the perspective of his administration the calamities and disasters, the anticipation of which has filled so many with terror and dismay.

"I thought it certain that a change of *men* would follow his elevation to power—but I did not forebode from it any *such* change of *measures* as would put in hazard the public happiness. I believed, and do still believe him to be too wise not to comprehend, and too honest not to pursue the substantial interests of the United States, which it is in fact almost impossible to mistake, and which he has every possible motive to secure and promote. I did not credit the suggestions that unworthy prejudices against one nation, or childish predilection for another, would cause him to commit the growing prosperity of his country to the chances of a war, by which much might be lost, but nothing could be gained, except the fruits of petty hostility and base pillage on the ocean. I did not credit, and often did not understand, the vague assertions that he was a disorganizer—an enemy to all efficient government—a democrat—an infidel, &c. &c.

"In the past conduct of Mr. Jefferson, so far as it had come to my knowledge, I discovered no just foundation for these assertions—and I am not to be influenced by mere clamour from whatsoever quarter it may come. In short, I never could persuade myself to tremble, lest the United States should find, in the presidency of Mr. Jefferson, the evils which might be expected to flow from a weak or a wicked government. I am, on the contrary, satisfied that he has talents, knowledge, integrity, and stake in the country sufficient to give us well-founded confidence, that our affairs will be well administered so far as shall depend on him; although he may not always perhaps make use of exactly the same means and agents that our partialities or peculiar opinions might induce us to wish.

“ I hope you are deceived as to the possible consequences of the ensuing state elections. What has Mr. Jefferson’s being President of the United States to do with your General Court, Chancery, &c. ? Without tracing the peril in which these establishments manifestly are, to the ascendancy of this or that political party in the nation at large, it may be found in the local interests of the different counties at any distance from the seat of Justice—in the interests of the attorneys who swarm in every part of the state, and in the House of Delegates—in the plausible and popular nature of the theory that justice should be brought home to men’s doors, and that it should be cheap, easy and expeditious—in the love of change which half the world believe to be synonymous with improvement—in the disgust of parties who have lost their cause and their money at Annapolis, or Easton, and who imagine they would have done better in the County Court—and in a thousand other causes that a long speech only could enumerate. Five years ago your House of Delegates voted the abolition of the General Court, and yet Maryland was at that time in high reputation as a *federal* state. The Senate, it is true, rejected the bill ; not, however, because they were more federal than the House of Delegates, but simply because they had good sense enough to perceive that the bill was a very foolish affair ; and I have confidence that your next Senate, whether Mr. Jefferson’s partizans or opposers, will manifest the same soundness of mind and firmness of conduct. I profess I am a good deal surprised that you at Annapolis who are interested locally, as well as generally, in preserving the General Court, &c. should be so imprudent as to cause it to be understood that you consider the whole of a great and triumphant party in the state as hostile upon principle to these establishments. For my part, I would hold the opposite language, and would industriously circulate my unalterable conviction that *this* was no party question, but such a one as every honest man, a friend to the prosperity of Maryland, and to the purity of justice, cannot fail to oppose. By making a party question of it, you are in greater danger of a defeat than you otherwise would be, because you may give *party men* inducements to vote for it, who in a different and more correct view of the subject might vote

the other way. You are on the spot, however, and must have better means of judging on this head than I have. No man would lament more sincerely than I should do the destruction of what I consider the fairest ornaments of our judicial system. If I was among you, I would spare no honest effort to stem the torrent of innovation, which has long been threatening the superior courts, and will finally overwhelm them. But I should not believe that I was promoting my object by putting in array against me, and insisting on considering and treating as adversaries, a numerous and zealous body of men with whom I happened to differ on some other topic, and who perhaps if I would allow them to take their own stations, would be found on my side."

"LONDON, July 21st, 1803.

"DEAR N.,—I received your kind letter of the 31st of May on yesterday. You had omitted to write to me for so great a length of time, that I had despaired of again hearing from you during my stay in England. Your letter has, of course, given me more than usual pleasure.

"I offer you my congratulations on your marriage, which you have now for the first time announced to me. Mrs. P. desires me also to offer you hers. We both wish you all the happiness you can yourself desire.

"It is now certain that I am not to see you this year. Our commission will, however, close next winter, and in April or May, if I live and do well, I shall undoubtedly be with you. In the mean time, such insinuations as you mention, let them come from what quarter they will, (and I can form no conjecture whence they come,) can give me no uneasiness. I am not so inordinately fond of praise as to be disappointed or provoked when I am told that there are some who either do or affect to think less of my capacity than I would have them. What *station* you allude to, I am wholly unable to judge, but I know that I have never solicited any. I am no office-hunter. Without professing to shun public employment when it seeks me, I can truly say that I disdain to seek it. My reliance, both for character and

fortune, is, under Providence, on my profession, to which I shall immediately return, and in the practice of which I do not fear to silence those insinulators. What I am must soon be seen and known. The bar is not a place to acquire or preserve a false or fraudulent reputation for talents; and I feel what is, I hope, no more than a just and honourable confidence, in which I may indulge without vanity, that on that theatre I shall be able to make my depreciators acknowledge that they have undervalued me.

“I shall mingle too in the politics of my country on my return; (I mean as a private citizen only;) and then I shall not fail to give the world an opportunity of judging both of my head and my heart. Enough of this.

* * * * *

“I have constantly believed that America has nothing to fear from the men now at the head of our affairs—and in this I think you will soon agree with me, notwithstanding the interested clamour of their adversaries. * * * Time will show in what hands the public power in America can be most safely deposited. To that test you will do well to refer yourself. In the mean time it appears to be a rational confidence that no party can long abuse that power with impunity.”

The following are extracts from letters to his friend, Mr. Cooke, an eminent lawyer in Maryland.

“LONDON, *August 8th*, 1803.

“MY DEAR SIR,—The kindness of your last letter, which I received about a week ago, and which I shall long bear in mind, will not allow me to forego the pleasure of writing you once more (though but a few lines) during my stay in England. I say *once* more, because I trust that early in the spring I shall commence my voyage for America, and of course shall have no inducement to write again. I was entirely convinced before the

receipt of your last, that your letter of December, on the subject of the Maryland business, was dictated as you say, by friendship ; and I not only felt all the value of the motive, but thanked you sincerely for the communication itself.

“ I had not heard of your rejection of the appointment to the Court of Appeals, and I am truly sorry that you have rejected it. Of the circumstances attending the offer or the views by which it was either influenced or resisted, I know nothing ; but I know that the appointment would have been the best that could have been made ; and I believe that the public have a right to your services, now that it is no longer necessary that you should labour for yourself. I have, however, so much reliance on the correctness of your judgment, that I must presume you have done right, and that I see only half the subject.

“ I am prepared on my return to find the spirit of party as high and phrenzied as the most turbulent would have it. I am even prepared to find a brutality in that spirit which in this country either does not exist, or is kept down by the predominance of a better feeling. I lament with you that this is so ; and I wonder that it is so—for the American people are generous, and liberal, and enlightened. We are not, I hope, to have this inordinate zeal, this extravagant fanaticism, entailed upon us—although really one might almost suppose it to be a part of our political creed that internal tranquillity, or rather the absence of domestic discord, and a rancorous contention for power, was incompatible with the health of the state, and the liberty of the citizen. I profess to be temperate in my opinions, and shall put in my claim to freedom of conscience ; but when both sides are intolerant, what hope can I have that this claim will be respected ? At the bar I must contrive as well as I can, for I must return to it. I have no alternative ; and if I had, choice would carry me back to the profession. I do not desire office, although I have no such objections to the present administration, as, on what are called party principles, would induce me to decline public employment. It is my wish to be a mere professional labourer—to cultivate my friends and my family, and to secure an honourable independence before I am overtaken by age and infirmity. My present intention is to fix in Baltimore, where I will flatter

myself I shall find some who will not regret my choice of residence. I had understood with unfeigned concern the severe loss you allude to, and knew the pain it would occasion. You have, however, the best of consolations in those whom she has left behind ; and it is my most earnest wish that they may be long spared to you, and you to them. In a family like yours every loss must be deeply felt ; for none can be taken away without diminishing the stock of worth and happiness to which each is so well calculated to contribute. But you have still about you enough to preserve to life all that belongs to it, of interest and value, to which, my dear Sir, you can add that which many cannot, the perfect consciousness of having deserved it. I beg you to remember me in the most friendly terms to your sons, and to present our affectionate compliments to Mrs. Cooke."

" LONDON, *February 15th*, 1804.

" MY DEAR SIR,—Your letter of the 2d of December, which I received on the 23d of last month, is among the most pleasing of the many proofs which my long absence from America has procured me of your valuable friendship. It is not in my power to manifest by words the sensibility which such kindness excites in my heart. I must leave it to time therefore to offer me other means.

" The application to the government of the United States, for an outfit; was the joint application of Mr. Gore and myself ; and as it was addressed wholly to the *justice* of the government, and asked no favour, I did not suppose that it would be proper to endeavour to interest my friends generally in its success. It seemed to me that this would have argued a distrust either of the claim itself, or of those to whom it was preferred ; and as I really had the most perfect confidence in both, I was not disposed to act as if I had none. Accordingly, I mentioned the subject only to General Smith, as a senator of the United States, requesting of him, in case the President should lay it before Congress, such explanations and support as it might seem to him to require, and his view of it, (*as a demand of right*,) would justify. More than this, I could not prevail upon myself to do, although I began several letters to different persons whose good

offices I thought I might venture to ask. General Smith has answered my letter, and otherwise acted on this occasion in a way to deserve my particular thanks. I have no doubt, however, that the claim has been rejected; and I understand that I am not likely to derive much consolation for this rejection, from the manner in which our application has been received and treated. It would not be proper to say more upon a transaction of which I have at present such scanty knowledge, and the result of which may not be such as I conjecture it to be.

“General Smith mentions another matter, of which you also take notice—I mean the desire expressed by some gentlemen of Baltimore, who have been benefitted by my services in England, to make me some pecuniary acknowledgment. My answer, written in a hurry, and therefore, perhaps, not exactly what it ought to be, declines this proposal, for which, however, I cannot but be sincerely thankful to those from whom it proceeds. General Smith will probably show you my letter, and I should be glad that you would even ask him to do so.

“As to the arrangement of a loan, it is liable, in substance, to all the objections applicable to the other, and consequently inadmissible. I must, therefore, do as well as I can with my own resources—and I have the satisfaction to know that I shall leave England with my credit untouched, and in no *tradesman's* debt. If it will distress me to return to Maryland, with my large family, (as I am not ashamed to confess it will,) I shall at least have to sustain me under it, the consciousness that no vice has contributed to produce it—that my honour has no stain upon it—and that although it may be a misfortune to become poor in the public service, it is no crime. For the rest, I rely upon Providence and my own efforts in my profession.

“I am ashamed, my dear Sir, that almost every word of this letter has myself for its subject; and I should be yet more so, if I did not recollect that it is to you who have encouraged me thus to play the egotist. I am not likely, however, to sin in this respect, at least for some time, as I hope to leave this country in March, for the United States, and shall of course be under no temptation to write again, even to you.

“The affair of the Maryland stock is in train, and I have now a fair prospect of settling it (as I hope satisfactorily) after much

anxiety, vexation, and difficulty. A week or two more will, I trust, conclude it. I shall not make any communication on this subject to the government of the United States, or of Maryland, until I am enabled to say that the stock has been transferred. Some sacrifice on our part has been found indispensable—but if with that sacrifice the residue can be immediately secured, we ought, in my opinion, to rejoice. That business closed, I shall only wait for a vessel sufficient to accommodate my family, bound to Baltimore. None has yet offered—and I begin to have some fears on that score. I must have patience.”

* * * * *

Mr. Pinkney's services in the business of the Bank Stock were suitably acknowledged by the State of Maryland, after his return to this country, as will appear by the following extract from a letter to his brother, Mr. Ninian Pinkney.

“BALTIMORE, *Thursday night*.

‘DEAR N.,—I have received your letter by W., and the others of a prior date. I am perfectly satisfied with the resolution, and have no wish that more should be done. I am grateful to the House of Delegates for their kind and liberal attention to my fortune and character, and should be sorry that any of my particular friends should express any dissatisfaction, or endeavour to procure any addition to the compensation. My desire has always been that the act of the Legislature should not only appear to be, but should, *in fact*, be perfectly voluntary—unsolicited on my part, or on the part of my family or friends. In this light I consider the resolutions of which you have enclosed me copies; and in this light, I think I cannot but approve of them.

“I thank you for your observations as to Col. Mercer—I have the utmost confidence in his friendly disposition. Tell Mr. Montgomery that I have received his kind letter, and am more obliged to him than I am able to say, for that and other proofs of his regard—which I shall ever bear in mind. I think I shall go to Annapolis on Monday next, but am not sure. The resolutions, however, ought not to be delayed.”

On his return to the United States, in August, 1804, Mr. Pinkney immediately resumed with renewed ardour his professional pursuits. During his long residence in England, he had never laid aside his habits of diligent study, and had availed himself of his opportunities of intercourse with the accomplished lawyers of that country, and of frequenting the courts of justice, to enlarge and improve his legal attainments. He was, by his public station, brought into immediate contact with most of the eminent English civilians; and was much in the society of that accomplished and highly gifted man, Sir William Scott. He had occasion to witness some of the powerful exertions at the bar, of Mr. Erskine, who was then in the meridian of his fame. He was in the constant habit of attending the debates in the two houses of Parliament; a higher standard of literary attainments than had been thought necessary to embellish and adorn the eloquence of the bar in his own country was held up to his observation. He employed his leisure hours in endeavouring to supply what he now found to be the defects of his early education, by extending his knowledge of English and classical literature. He devoted peculiar attention to the subject of Latin prosody, and English elocution; aiming, above all, to acquire a critical knowledge of his own language—its pronunciation—its terms and significations—its synonymes; and in short, its whole structure and vocabulary. By these means

he added to his natural facility and fluency, a copiousness and variety of elegant and appropriate diction, which graced even his colloquial intercourse, and imparted new strength and beauty to his forensic style.

Soon after his return from England, he sought a more ample field for his professional labours, by removing from Annapolis to Baltimore, and by attending the Supreme Court at Washington. In 1805, he was appointed to the office of Attorney-General of the state of Maryland, which he accepted, upon the conditions mentioned in the following letter; and with the view of consulting the feelings, and (as far as possible) reconciling the conflicting claims of two of his friends.

“ BALTIMORE, *December 22, 1805.*

“ DEAR N.—I send by Mr. Wilnot my answer to the letter of the Board, which will of course be considered as an acceptance of the office of Attorney-General.

“ I cannot now refuse this office, although personally inconvenient and disadvantageous. My intention is not to touch a farthing of the emoluments of it, but to give them to Mr. Scott; and as soon as Mr. Johnson is constitutionally capable of holding it, to resign the appointment into the hands of those who now offer it to me, to be then disposed of as they shall think proper.

“ I trust that this course of conduct has nothing in it which can be disapproved. It is at least disinterested—for I can derive no possible advantage from it, and shall necessarily sacrifice what I might otherwise gain by appearing *against* the State. I shall take care that the duties of the office are properly discharged by myself personally, when necessary.”

* * * * *

Mr. Pinkney continued to prosecute his professional pursuits with unwearied assiduity, until the year 1806, when he was again called into the service of his country by events which were even then thought to be of great concern, and which ultimately involved the United States in war with Great Britain.

In the course of the ensuing year after his return from England, several cases of capture of our merchant vessels, engaged in carrying the produce of the colonies of the enemies of Great Britain to Europe had occurred, which threatened the total destruction of that important branch of our carrying trade. These seizures were grounded upon a revival, by the British government of a doctrine which had acquired the denomination of *the Rule of the War of 1756*, from the circumstance of its having been first applied by the Courts of Prize in that celebrated war. The French (then at war with Great Britain,) finding their colonial trade almost entirely cut off by the maritime superiority of the British, relaxed their monopoly of that trade, and allowed the Dutch (then neutral) to carry on the commerce between the mother country and her colonies, under special licenses or passes, granted to Dutch ships for this particular purpose, excluding, at the same time, all other neutrals from the same trade. Many Dutch vessels so employed were captured by the British cruizers, and, together with their cargoes, condemned by the Prize Courts, upon the principle that by such employ-

ment they were, in effect, incorporated into the French navigation, having adopted the character and trade of the enemy, and identified themselves with his interests and purposes. They were, in the opinion of these Courts, to be considered like transports in the enemy's service, and hence liable to capture and confiscation, upon the same principle as property condemned by way of penalty for resistance to search, for breach of blockade, for carrying military persons or despatches, or as contraband of war; in all which cases the property is considered, *pro hac vice*, as enemy's property; and so completely identified with his interests as to acquire a hostile character. But it is obvious to remark that there is all the difference between this principle and the doctrine which interdicts to neutrals, during war, all trade not open to them in time of peace, that there is between the granting by the enemy of special licenses to the subjects of the belligerent state, protecting their property from capture in a particular trade, which the policy of the enemy induces him to tolerate, and a general exemption of such trade from capture. The former is clearly cause of confiscation, whilst the latter has no such effect. The rule of the war of 1756 was founded upon the former principle, and likewise upon a construction of the treaties between Great Britain and Holland, in which the former power contended was conceded to the latter a freedom of commerce only as to her accustomed trade in time of peace. The Rule lay dormant during the war

of the American revolution; but was afterwards revived during the first war of the French revolution, and extended to the prohibition of all neutral traffic whatsoever with the colonies, and upon the coasts of an enemy. But as indemnity was given by the Commissioners under the treaty of 1794 for captures made upon this pretext, and as it had been expressly admitted in Lord Hawkesbury's letter to Mr. King, of April 11th, 1801, (enclosing an official report of Sir John Nicholl, then Advocate General,) that the colonial trade might be carried on circuitously by neutrals, and that landing the cargo broke the continuity of voyage, so as to legalize the trade thus carried on, there was the more reason for surprise and complaint on the part of the government and people of the United States at this unexpected attack upon our commerce.

The revival and extended application of this Rule gave rise to numerous publications both on this and the other side of the Atlantic; in which the respective pretensions of both countries were elaborately discussed. Among these was a pamphlet, entitled, *War in Disguise, or the Frauds of Neutral Flags*, written by Mr. Stephen, an English barrister, who had been much engaged in the argument of Prize Causes, before the Lords of Appeal, and was supposed to enjoy the confidence of the ministry. This production was examined, and its reasonings successfully combated by a very able writer in the Edinburgh

Review.* It was also answered by Mr. Gouverneur Morris; and the whole subject was afterwards thoroughly discussed by Mr. Madison, in a work entitled, "An Examination of the British doctrine which subjects to capture a neutral trade, not open in time of peace." Different memorials were presented to Congress from the commercial cities of the Union, remonstrating with zeal and energy against this dangerous pretension. Among these was a Memorial from the merchants of Baltimore, which was drawn up by Mr. Pinkney, and was communicated by the President to Congress on the 29th of January, 1806.†

The distinguished part which Mr. Pinkney took in this important discussion, and the thorough knowledge of the subject shown in this paper, together with the valuable experience he had acquired during his former residence in England, induced Mr. Jefferson to invite him to assist in the negotiations with the British government on this and the other points of difference between the two countries. With this view, he was appointed in April, 1806, jointly with Mr. Monroe, (then the minister resident of the United States in London,) as minister extraordinary to treat with the British cabinet on those subjects. He, therefore, once more left his professional pursuits, and embarked with his family for England in May, and on his arrival immediately pro-

* Vol. VIII. No. XV. April, 1806.

† See PART SECOND, No. II.

ceeded, in conjunction with Mr. Monroe, to execute the duties confided to them.

Some time after his arrival in England, Mr. Pinkney received from his friend, Mr. Cooke, a letter informing him that his motives in accepting this appointment had been subjected to much misconstruction. The following answer to this letter will show in what manner he justified his conduct.

"LONDON, October 5th, 1806.

"MY DEAR SIR,—I am very much indebted to you for your truly kind letter of the 4th of August, which has just reached me. It contains the best proof in the world of your good opinion and regard. It speaks to me with candour, and, at the same time that it betrays the partiality of a long-trying friendship, guards me against the disappointment to which a sanguine and credulous temper might expose me, and enables me to anticipate in season the misconceptions and calumnies which are preparing for me. This anticipation is certainly wholesome; but it is unpleasant, notwithstanding. The language of reproach is new to me, and I fear I shall not easily learn to bear it with a good grace from a country which I have ardently loved and faithfully served with the best years of my life. The consciousness that I do not, and cannot deserve it, consoles me in one view, while it mortifies me in another. I am proud of the unqualified conviction of my heart and understanding, that I am incapable of any thing that an honest man should blush to avow; but it gives me pain to find that no purity of motive, or integrity of conduct, can afford shelter in this world from the vilest and most disgusting imputations. Our country is young, and ought to be generous and charitable; and I believe that the great bulk of our people are so. But I do not need to have my actions *charitably* interpreted. I ask only a *just* construction of them; I care not how rigorous, if it be not malignant. It seemed natural to suppose, that putting former character out of the question, the circum-

stances under which I last came abroad would at least secure me from the suspicion of selfish views and time-serving policy ; and I am, of course, surprised that a man can be found to infer, from my acceptance of the arduous trust, in which I am now engaged, 'that I have deserted my principles and my friends, and pledged myself to support the party in power and their measures to every extent.' What principles, in God's name, and what friends have I deserted ? The plain matter of fact is thus : A great national crisis occurs, which requires, or is supposed to require, an extraordinary foreign mission. The President, whom I might be said to know only by character, offers this important charge to me. I give up my profession. I surrender all my hopes of future fortune. I forego a second time, and *for ever*, the expectation of placing my numerous and helpless family in a state of independence, and accept this anxious trust, which, instead of promising pecuniary emolument, is likely to bring with it a heavy pecuniary loss, and which, so far from promising to do me honour, puts in hazard the stock of reputation I have before acquired. Now what abandonment of principle is there in all this ? I am willing to admit that I may have acted improvidently, as regards myself and my children, and that I may have overrated my capacity, and undertaken a task to which I am not competent. But I am quite sure that I have not deviated from that path of honour in which, with an approving conscience, I have walked from my boyish days. My appointment is known to have been as completely unsolicited as ever appointment was from the beginning of the world. It came to me wholly unsought. It is to the credit of the government that it did so. It came to me unclogged by any terms or conditions. They who talk of a *pledge* on my part, as the consideration of it, know that they insinuate a base and detestable falsehood. No such pledge, no pledge of any kind, was ever proposed to me. I was treated with honour, and delicacy, and confidence ; and I have a firm reliance that I shall continue to be so treated. An attempt to treat me otherwise, would drive me in a moment from office, as it would have prevented me from accepting it. As to this *pledge*, the slander is too gross to be believed. I have an intimate persuasion, founded upon a consciousness

which I cannot mistake, of integrity without blemish, that no man would undertake to suggest to me so vile and infamous a compact as the price of public station. The acceptance of my appointment may, indeed, *imply* a pledge; and I am content that it shall be taken to be as large as honour will permit. In its utmost size, whatever that may be, I will faithfully redeem it, and should be ashamed to have it supposed that I could shrink from a duty so pressing and obvious. The foolish, and often hypocritical cant about apostacy and desertion of principles, shall not frighten me from the steady and manly course to which this duty directs me. I have never professed any principles with which my present situation, connected as it unquestionably is with the great interests of my country, is in the slightest degree inconsistent. I find nothing in the objects of it, in the means by which I am instructed to accomplish those objects, or in the measures of the government preparatory to the mission, which I do not entirely approve, and have not uniformly approved.

“As to the friends I have deserted, who are they? I accepted my appointment, as far as I could ascertain, with the entire concurrence of my friends of all parties; and I rejoice that I have friends of all parties. It was that flattering concurrence which encouraged me to hope that the anxiety inseparable from my undertaking would not be aggravated by unjust and unfeeling prejudices, and that I should have no difficulties to struggle with, but such as I should find here. The affection of many of my friends induced them to express their fears that, as an individual, I should suffer by the mission. But they did not conceal their approbation of my appointment, and did not intimate that any but prudential considerations ought to restrain me from accepting it. I have since been frequently consoled by the recollection of this, the most interesting period of my life.

“I beg your pardon for all this egotism. But your letter has affected me, and I have obeyed the impulse of my feelings, considering myself as writing to you only, and that my letter will not be seen by many others.

“Upon the idle or malicious observations at Philadelphia and New-York, (the source of which I will not at present give myself the trouble to conjecture,) I have no remark to make. I

thank you sincerely for placing that subject in its true light. I will only say that I am not Mr. Chase's enemy, although in return for unwearied services and a zealous attachment of more than twenty years, during which no discouragements could drive me from him, he has lately been induced to act as if he were mine. Ingratitude is a harsh word, and they who have ventured to apply it to me, should first have been sure of their facts. They will, I presume, take care not to force such observations too much upon my notice.

"Your fears upon the subject of the non-importation act of Congress are unfounded. It has, at no time, produced any bad effect here. It was, undoubtedly, a wise and salutary law. Such was my opinion of it at the time, and the event has proved that opinion to be just. Mr. Fox's illness and death have retarded us, but the prospect is good, nevertheless. Whether the country is likely to be satisfied by the result of our labours, must depend upon the nature and extent of their expectations. The state of Europe and the world has a title to be considered.

"Lord Howick (Mr. Gray) is now at the head of the Foreign Department; but Lords Holland and Auckland will go on with us, and it is hoped that we shall soon bring the negotiation to a conclusion. Lord Auckland is, however, absent from town for a few days, and Lord Holland is prevented from meeting us until after his uncle's funeral. The subjects are all difficult and delicate. The commercial subject is undoubtedly so, but not on account of any intricacy belonging to it.

"I have been received here in a very flattering manner, and the best dispositions have been and continue to be manifested towards the mission, and our country and government. You will perceive by the newspapers that Captain Whitby is returned in the *Leander*, and is to be tried by a court martial. The continent has resumed its warlike attitude—but I will not fatigue you with news which will probably be stale before my letter reaches you. The British conquest of Buenos Ayres is an important event. It cannot be favourable to us, however. The intercourse with it will be regulated by the old principle of monopoly, and Great Britain will hold fast upon it if she can. It is even probable that (although Sir H. Popham is said to have undertaken the expedition without proper authority) an extension of this conquest, to-

gether with other enterprises against Spanish America, will be attempted. The conquest is an extremely popular one. The treasure brought home in the *Narcissus*, and the immense exportations of British goods to Buenos Ayres which have followed the knowledge of its surrender to the British arms, have had a wonderful effect.

“ Lord Lauderdale is still at Paris, although Buonaparte and Talleyrand, and even Clarke (who with Champagny negociated with him) have left it ! The situation of the continent is more doubtful than at any former period. Another crisis so near to the last, and of a character so decisive, was hardly to be expected. If Prussia ventures to measure swords with France, (and it seems now to be certain that she *must*,) Russia will assist her ; but Prussia, with Saxony and Hesse, must stand the first onset, which promises to be terrible. Austria cannot long be an idle spectator, and she is well prepared to act with effect. Her forces are recruited, and their discipline improved. Sweden will aid the power that was so late her enemy. The magnanimous king of that gallant nation has a spirit far beyond his means. Great Britain and Prussia seem to be restored to a good understanding. The blockade, which arose out of the subserviency of Prussia to the views of France, has been raised. Jacobi is on his return to this country, and Lord Morpeth talked of here for a mission to Berlin. The most perplexing circumstance in the present picture of the continent, is the stay of Lord Lauderdale at Paris. Upon what basis can G. B. negotiate with France in the present conjuncture of affairs ? The *uti possidetis* (with the restoration of Hanover to its lawful sovereign) sounds well ; but a separate peace with France upon any terms, at a moment when the continent may be said to be in its last agonies, and taking courage from despair, is about to make its last effort for life and independence, would be a strange spectacle. I have no belief that it is possible. I have been incredulous from the first.

“ I have been restrained from writing to my friends generally since my arrival here, by the consideration that I could not write freely, and that the appearance of reserve in letters not invited by them, would be worse than absolute silence. I hope soon to hear from several of them, and will then write. I cherish an

affectionate remembrance of Baltimore, which nothing can ever impair."

• • • • •

I have thought proper to insert the following extracts from various communications which passed between Mr. Monroe and Mr. Pinkney, during their joint negociation, as illustrative of peculiar traits of character, and throwing occasional light upon some of the passages of the times, and also showing the mutual confidence and friendly feelings which subsisted between these eminent persons.*

From Mr. PINKNEY to Mr. MONROE.

"MY DEAR SIR,—General Lyman has met with a Captain Warrington, of the *Patty* (of Philadelphia,) who in his voyage from Philadelphia to Amsterdam, was spoken by the *Leander*, and had conversations with Captain Whitby, and a Lieutenant on board the *Leander*. The Lieutenant admitted distinctly that the *Leander* was not more than two miles from the shore at the time of the shot which resulted in Pierce's death—and that the shallop was about a mile nearer the shore than the *Leander*; but he appears to have declared further, *that the shot was not intended for the shallop.*

"General Lyman is desirous to know whether the deposition of this captain might not be useful. As this subject is entirely yours, I would not undertake to determine or give any directions upon it; but at General Lyman's request write this note. He

* Mr. Monroe has had the goodness to furnish the editor with an explanation of such parts of these papers as could not be made intelligible by a mere reference to the printed collection of State Papers.

will, of course, expect your opinion and directions with as little delay as possible, as the captain wishes to depart immediately.

"I have not thought myself justified in calling, *without you*, to make inquiries after Mr. Fox's health, but it is understood that he mends. If I do not see you soon, I will seek you at Low Layton. I hope, however, to meet you to-day at Sir Francis Baring's.

BLAKE's, *Jermyn-street*, July 1.

I am, &c.

"P. S. I have taken a temporary house in Baker-street, No. 46, and shall be in possession to-morrow morning."

From Mr. MONROE to Mr. PINKNEY.

"PORTLAND PLACE, July 17, 1806.

"DEAR SIR,—I have the pleasure to enclose you a copy of a paper which I propose presenting at a proper time to Mr. Fox.* I will thank you to examine it, and to suggest any alterations which may appear to you necessary to be made in it. The outrages which were committed at the same port in 1804, by the same vessels, under other commanders, as is presumed, in both cases, are not noticed in it. It has seemed probable to me that if I connected the two cases, the pressure in regard to the last one might be weakened: that it is better to single that out for immediate example, and touch the other in conference, or by a special explanatory note, if necessary, hereafter. I am not decided in this opinion, and only suggest it for your consideration; we will confer on it to-day when we meet.

"I gave notice to the keepers of the Parks on Sunday last of your office and privilege in that respect."

* A note on the subject of the outrages committed off the harbour of New-York by Captain Whitby, commanding a squadron of British vessels.

Mr. PINKNEY to Mr. MONROE.

"DEAR SIR,—I send you enclosed a copy of the B. project on Impressment.*

"It has just occurred to me that we have not answered the letter respecting Sir H. Hoskyns' memorial lately sent to us ; and as it may save you trouble, I have written (but in great haste, and with a very imperfect recollection of the memorial which you have ;) a letter in reply, which I beg you either to adopt, amend, or reject entirely, for any other, that upon looking at the papers may appear to suit the case."

From the same to the same.

"Thursday, Nov. 5, 1806.

"MY DEAR SIR,—I send herewith enclosed the hasty sketch of an article on the subject of Compensation. I send also the amendments which it is presumable the project of the British Commissioners will require.

"I do not send an article on the subject of an open trade with the West Indies, because they are not likely to agree to such a trade ; but you will find the *exception as to that trade*, which I suppose the 9th article must be subjected to.

"I have suggested a provision in the 12th† article as to *Contraband on return or resumed voyages* ; but I have some recollection that you have prepared one which I entirely approved. The amendments I propose to the other articles you will see upon examining the paper itself."

From the same to the same.

"GREAT CUMBERLAND PLACE, Nov. 4, 1806.

"DEAR SIR,—I regret very much that Sir John Nicholl has

* See Waite's State Papers, vol. VI. p. 324.

† The 9th article of the Treaty as finally agreed on. Waite's State Papers, p. 357-358.

been applied to for such a paper as Lord Auckland enclosed to you.* Shallow as it is, I think it increases the necessity to be very firm and positive on our side on the point to which it relates. There must be some end of this question.

"I am extremely sorry that I happen to be engaged to-morrow evening, so as to make it impossible for me to be of your party at dinner. I shall take care to be at home when you call to-morrow. I perceive that half-past one is the time when we are expected."

From Mr. MONROE to Mr. PINKNEY.

"DEAR SIR,—I have the pleasure to send you a note from the British Commissioners in the sense suggested by them in their last interview.† It appears to be drawn with great attention to the object, and to be as free from objection as any paper they can draw, which does not answer our purpose. If you think so, nothing need, as I presume, be said to them respecting it.

"I am engaged in the letter to the Secretary of State, which I hope to finish, on the plan it is commenced, to-day.‡ Yours, sincerely,

J. M.

Nov. 9, 1806.

"I send you a note from General Lyman, which shows that the omission to send you an invitation to the Lord Mayor's feast was owing to the cause I had supposed. I shall be forced to decline going, on account of the early departure of the vessel by which we shall send our despatch, which, however, will not sail till Tuesday."

* A report from Sir John Nicholl, King's Advocate General, justifying the British practice of impressing seamen on board of neutral vessels upon the high seas, on the ground that the King has a right to require the service of all his sea-faring subjects, and to seize them by force, wherever found, unless within the territorial limits of another power

† Upon the subject of Impressment Waite's State Papers, vol. VI. p. 339.

‡ Waite's State Papers, vol. XI. p. 320.

From Mr. PINKNEY to Mr. MONROE.

"DEAR SIR,—The note of the B. Commissioners is as satisfactory as it could be made. I think it does not require any answer.

"If you do not go to the Guildhall dinner, I shall of course make an apology. I really do not wish to go."

From Mr. MONROE to Mr. PINKNEY.

"DEAR SIR,—I have just received the enclosed from Lord Holland, which I regret was not directed to us both. I should express that sentiment to him, but that it might induce him to suppose there was some etiquette between us. Though an informal paper, it is a very interesting one on a public subject.*

"On the first point, the answer seems to be, that we shall of course claim the same jurisdiction of other powers that is agreed on with G. Britain, or be answerable to her for a departure from in her favour. To the other, no answer is now expected. To me, however, it appears best that I should reply that we will consult together on both, and as it is his intention that we should meet on Friday or Saturday, that we will be prepared to communicate to him then freely our sentiments on both points. I will, however, do whatever you think best, and am very sincerely yours.

November 14, 1806."

From Mr. PINKNEY to Mr. MONROE.

"DEAR SIR,—I think the course will be as you suggest—that you should write such an answer to Lord Holland as you mention."

* This note of Lord Holland to Mr. Monroe, related to jurisdiction on our coasts. He asked whether we could support it to the same extent against France. It also related to the duties on British manufactures, and inquired whether we would give a preference to those of Great Britain in return for other commercial advantages.

From Mr. MONROE to Mr. PINKNEY.

"DEAR SIR,—I have this moment received the enclosed informal note from Lord Holland, which is quite vague and indeterminate on our business. It is very discouraging, after what has passed, to find ourselves in this situation. I am really quite prepared to give a new character at an early period to the negotiation. However, on this point, we will confer before the next meeting, and it is to be hoped that the decisive conduct of those persons in it, will make an appeal to any other than the motives which have hitherto prevailed in the negotiation unnecessary. * * * *

"PORTLAND PLACE, *Monday evening, 17th Nov.*"

From Mr. PINKNEY to Mr. MONROE.

"MY DEAR SIR,—To-morrow is, I think, the day appointed for meeting the B. Commissioners. I will call for you in my carriage before eleven. The article in the *Courier* of to-night, is a very curious one on the subject of our negotiation.

"Yours ever and truly,

"Friday night, 5th Dec. 1806.

WM. PINKNEY."

From Mr. MONROE to Mr. PINKNEY.

"PORTLAND PLACE, *February 11th, 1807.*

"MY DEAR SIR,—I have the pleasure to enclose you a letter which I have just received from Lords Holland and Auckland, announcing their authority from their government to pursue the objects which remain to be settled between the two countries.* They propose a meeting on Saturday or Tuesday next, as may best suit us. If you have no objection, I should prefer the earliest day. Will you be so good as to give an answer to that effect ?

* The subjects of Boundary, and Navigation of the Mississippi, Indian trade, compensation for spoliation, which had not been included in the treaty signed on the 1st December, 1806.

Perhaps it may be well to express some satisfaction that his Majesty has thought fit to commit this additional trust to characters in whom we so much confide, or with whom we have been happy to have been connected in the late negotiation—though in that do as you think best.*

“Do you and Mrs. Pinkney go to the court to-morrow? In case you do, we will have the pleasure to call for you at one o’clock, if you approve that hour. We probably suffered by being too late the last drawing-room.”

From Mr. PINKNEY to Mr. MONROE.

“Monday night.

“MY DEAR SIR,—I am extremely sorry that I was out when you were so good as to call. W. shall copy your project, which I have not yet read; and if I should think it worth while, my draft of an article, as a substitute for the 5th in the Convention, shall be copied also for consideration.

“I shall be happy to see you at any hour in the morning after ten. It may, perhaps, be well that we should have an hour together before we go to our Conference.”

* It may not be improper to observe that the Editor has been assured from the highest authority, that the British Commissioners, during the whole course of these negotiations, showed the most candid and conciliatory disposition, at the same time that they were duly attentive to the interests of their own country. That amiable and accomplished nobleman, Lord Holland, it is well known, cherishes for this country and its free institutions, those feelings of kindness which he imbibed from his illustrious relative, Mr. Fox, and which we may be allowed to believe have been confirmed by his own enlightened judgment. Lord Auckland seemed also desirous by a conciliatory deportment to remove any unfavourable impressions which might have been taken up against him during the war of our revolution, without however, advertg, on any occasion, to the transactions of those times. The British negotiators were, however, in the hands of their government, whose orders they obeyed; and it is well known that the cabinet itself was made up of fragile and discordant materials, all its proceedings being looked upon with extreme jealousy by the opposition of the day.

From the same to the same.

"MY DEAR SIR,—Enclosed is our project on the subject of Boundary. The 5th article is modelled upon Mr. King's convention, with a little of the phraseology of your plan introduced into it. The 6th relates to Grand Manan.*

"Be so good as to examine the two last, and mould them into any other shape that you prefer. The day has been so forbidding that I have not ventured out."

From the same to the same.

"February 23, 1807.

"MY DEAR SIR,—W. has nearly finished copying the note to Lord Holland and Lord Auckland. It remains as it did when I had the pleasure to see you, and will, I think, do very well in that form. I have not been able to accommodate what I struck out of the note in its first shape to the ideas lately suggested; and I hardly think it worth while to make another attempt. Any thing, however, that you think will improve it, shall be added; and if you believe that any thing more is necessary, I beg you to have the goodness to write it, and to mark the place where it shall be inserted. I send you my draft, and W.'s copy so far as it goes, which, I think, is as far as the end of your amendment. Be so good as to let me have these pretty early to-morrow, (between ten and eleven o'clock,) and the copy shall be completed for our meeting on Thursday, with the B. Commissioners. Will you take the trouble to call for me on Thursday?"

From Mr. MONROE to Mr. PINKNEY.

"MY DEAR SIR,—I have this moment received the enclosed from Lord Auckland, by which I find with surprise that we

* See Waite's State Papers, vol. vi. p. 287-309.

were expected at his office yesterday by him and Lord Holland. I read his note to me as you did, and we are therefore not to blame for the omission. I am going to call on Lord Auckland with Colonel Humphreys about two, and will come by for you in my carriage if you will be so good as to accompany us; it will furnish an opportunity for making an explanation without form.

"I will bring our note about indemnities, which I think we shall easily arrange, and very satisfactorily, by leaving out one paragraph, and making one or two modifications which I will explain."

From Mr. PINKNEY to Mr. MONROE.

"MY DEAR SIR,—I send you our letter,* with a copy of our letters to Lord Howick, and Lords Holland and Auckland.

The other letter (on the subject of the supplemental Convention) will be ready to-morrow or next day, and may be sent (together with a duplicate of this, which I will have prepared) by the Shepherdess.† I propose to date the other letter of the 25th of April. W. will make a copy of Mr. Canning's last note to us, if you will allow him, for the purpose of being enclosed."

From the same to the same.

"May 7, 1807.

"MY DEAR SIR,—I enclose a short letter to Mr. Madison acknowledging the receipt of his letter of the 18th of March, and transmitting Mr. Murray's statement of cases for hearing before the Lords of Appeal. Of this paper I have retained a copy.

* Mr. Pinkney and Mr. Monroe's joint letter of the 22d April, 1807, to the Secretary of State Waite's State Papers, vol. vi. p. 378.

† Waite's State Papers, vol. vi. p. 387.

‡ Waite's State Papers, vol. vi. p. 400.

"I enclose a letter of my own, which I beg you to have the goodness to send with the other, if by the *Shepherdess*."

It is well known that before the above negotiations were brought to a termination a change took place in the British cabinet which brought Mr. Canning into the Foreign Office; and the misunderstanding between the two countries was still further increased by the attack on the frigate *Chesapeake*, by the British frigate *Leopard*, in June, 1807. The new cabinet having determined to send a special minister to the United States, who, it was supposed, would also be authorized to adjust the other subjects of difference, Mr. Monroe was anxious to avail himself of this opportunity of returning home, and of leaving Mr. Pinkney in London, in charge of the affairs of this country, as minister resident. The difficulties which opposed this arrangement in the mind of Mr. Pinkney, and the motives by which his scruples were finally overcome, are explained in the following correspondence.

Mr. PINKNEY to Mr. MONROE.

"GREAT CUMBERLAND PLACE, *Friday, October 2, 1807.*

"MY DEAR SIR,—I think, upon reflection, that I ought not to go to Downing-street to-morrow for the purpose suggested in our conversation of this afternoon. I have certainly no public character here but that of Commissioner Extraordinary and Pleni-

potentiary, of which the functions, as defined in our joint commission, are different from those of a mere Minister Plenipotentiary. My eventual appointment of the 12th of May, 1806, as your successor in the ordinary legation, being the act of the President alone, could only be in force (as the commission itself very properly states) until the end of the session of the Senate next following its date. The letters of credence, it is true, do not contain the same express limit which is to be found in the commission; but the constitution of the United States creates it as effectually as if it were declared in the letters themselves. If I should request to be considered here as the general minister of our country, I could not refer that request to any authority from our government; but should be obliged to disclaim such authority at the very time of making the request. My evident want of power could only be supplied by you; but that would in substance (let the mode of doing the business be what it might) have the inadmissible effect of making me a *Chargé d'Affaires*.

"I am persuaded, therefore, that I cannot, with propriety seek to have any concern, without the further orders of the government of the United States, with such of our affairs here as are not within the scope of the special mission; although I feel no want of confidence that it would not be disagreeable to the President that they should be left in my hands upon your departure, notwithstanding that my commission has not been renewed, and that one of the most important of the subjects confided to our joint care, has recently been withdrawn, with a view to the public advantage, from the special mission, and confided solely to you."

Mr. MONROE to Mr. PINKNEY.

"MY DEAR SIR,—I have the pleasure to enclose you some notes which I have just received from Mr. Canning and Sir Stephen Cottrel, which communicate the arrangement made for my presentation to the King to-morrow, for the purpose of taking leave of him. I send you also a sketch of a note which I propose carrying with me to Mr. Canning, which is intended to transfer the business in my hands over to you. As it is my wish to form

this note in the manner best adapted to the object, and most agreeable to you, I hope you will be so good as to make any correction in it which you think proper."

From Mr. PINKNEY to Mr. MONROE

"MY DEAR SIR,—I see no objection to the terms of the note which you propose to leave with Mr. Canning. I take into consideration, however, that the subject will be explained in detail to Mr. Canning in your interview, and particularly that the letter of credence to the King will be shown to him. It is only in case this arrangement shall be found to be perfectly acceptable to the British government, that I presume the note will be left. In any other view the appointment of a mere *Chargé d'Affaires* will be the best course, and it is one to which I have not the slightest objection.

"I beg you to be assured that I have the utmost confidence, that you wish this affair to be made as satisfactory as possible to me—and that I have, on every occasion, a perfect reliance upon your friendship."

From the same to the same.

"MY DEAR SIR,—I did not happen to be at home when your note of this morning was brought here, and I have since my return been so much interrupted, that I could not send to you until this moment.

"I suppose it will be proper, and perhaps indispensable that an account (very brief indeed) of the transactions of the joint mission should go to the United States by the *Revenge*. You will find in a sketch now enclosed, what I have believed to be sufficient. If you approve, or will have the goodness to correct and add as you see occasion, and will then send it to me, I will have it copied to-night, and it may be signed, &c. early in the morning. I have copies prepared of all the enclosures, except only the project of alterations left with Mr. Canning. This you have, and if you will send it to me, I will have that copied also.

"The arrangement with Mr. Canning relative to myself, I have not mentioned in our joint letter. You will, of course, explain that to Mr. Madison, and I shall do so likewise. My letter to Mr. Madison I will send to you to-night, or to-morrow morning, and I beg of you to prevail upon Dr. Bullus to take charge of it.

"I return enclosed (with my signature) the letters to General Armstrong and Mr. Bowdoin, of which W. has taken copies to be transmitted with our joint letter to Mr. Madison. I enclose also copies of your note to Mr. Canning, and his reply upon my subject—which I presumed you wished, for the purpose of being transmitted in your own despatch. The originals I will give you to-morrow."

From Mr. PINKNEY to Mr. MADISON.

"*Private.*

LONDON, October 10th, 1807.

"DEAR SIR,—Mr. Monroe will, doubtless, sufficiently explain the subject of this letter; but it seems, notwithstanding, to be proper that I should trouble you with a very brief explanation of it myself.

"This government having determined to send a special envoy to the United States upon the subject of Mr. Monroe's late instructions, and it being probable (although not avowed) that this envoy would have ulterior powers to treat upon all the topics which affect the relations of the two countries, Mr. Monroe expressed a wish to return without delay to the United States, and to leave with me the affairs of our country in quality of Minister Extraordinary and Plenipotentiary. So far as respected the business of the ordinary legation, there was, undoubtedly, a difficulty of form, if not of substance, in the way of its coming into my hands in any other than the inadmissible character of a mere *Chargé d'Affaires*. My credentials as Mr. Monroe's successor, expired with the session of the Senate next following their date, and had not been renewed; and my commission as Minister Extraordinary gave only limited powers for specified objects. It appeared to be my duty, however, in case it should not be unacceptable to the British government to communicate with me in the event of Mr. Monroe's departure as if I were regularly accredited as the Minister Plenipotentiary of the United States, to

consent on my part to such an arrangement, as being more eligible in the present conjuncture than the appointment of a *Chargé d'Affaires*. Mr. Monroe accordingly wrote, with my approbation, a note to Mr. Canning to that effect, to which some personal explanations were added, and received a reply, of which a copy is enclosed, adopting the arrangement proposed.

“ You will perceive that, in lending myself to this step, I have ventured to infer the approbation of the President from what certainly does not express it. It would have been much more agreeable to me that a *Chargé d'Affaires* should be left, and that I should remain in my character of Commissioner Extraordinary until the government of the United States should have an opportunity of taking its own course. In that mode I should have been relieved from all embarrassment; but thinking that the public interest required the course actually adopted, and that it was, moreover, that which was likely to fulfil the expectations of the President, I did not consider myself at liberty to consult my own inclinations.

“ The concluding expressions of Mr. Canning's note afford me an opportunity of saying that, in awaiting here the orders of the President, I am ready to return or to remain, as he shall think the interest of our country requires. I beg you to be assured that as I accepted the trust which called me abroad with no selfish motive, (although I felt how much I was honoured by it,) I should regret that any indulgent feeling towards me should in any degree restrain the President from promoting, in the way he thinks best, that which I know is the constant object of his care—the general good. Neither the unteigned veneration in which I hold his character, nor the grateful recollection which I have not for a moment ceased to cherish of the manner in which he has been so good as to distinguish me, will suffer any abatement, although he should think fit to place some other than myself in the station which he once destined for me. I am quite sure that, whatever shall be done, the manner of it will be liberal and kind; and trusting, as I do most confidently, that I shall carry out of the public service, leave it when I may, the pure name with which I entered it, and the unabated good opinion of the government I have been proud to serve—the rest is of little importance.”

The signature of the articles of a treaty on the 31st of December, 1806, had been accompanied by a declaration of the British Commissioners, in which they asserted, on the part of their government, the right to retaliate upon neutral nations the decree of blockade issued by the Emperor Napoleon at Berlin on the 21st of the preceding November, and stated that the signature of the proposed treaty must not be considered as precluding the exercise of that right, in case the enemy should not, before the treaty was returned from America with the ratification of our government, have relinquished his pretensions, either formally or tacitly, or the United States, by their conduct or assurances, should not have satisfied the British government that it would not submit to the decree. This declaration was almost *immediately* followed by the Orders in Council of the 7th of January, 1807, in which neutrals were prohibited from trading from one port to another port, both of which ports should belong to, or be in possession of France or her allies. This measure, although it professed to be in retaliation of the Berlin decree, was in substance an extension of the blockade which had been notified on the 16th of May, 1806, of the coast, rivers, and ports from the river Elbe to the port of Brest, both inclusive, which was so qualified as merely to interdict the trade from port to port within those limits.

These extraordinary measures of France and Great Britain, together with the attack on the frigate Chesapeake, seemed to threaten the United States with the imminent danger of being involved in the European war. But Mr. Pinkney, in a private letter to Mr. Madison, dated the 13th of August, 1807, in which he speaks of the President's Proclamation relative to the recent outrage in our seas, states that the proclamation was approved in England, and had evidently produced the best effects—and that there was no room to doubt the disposition of that government to peace and atonement. This prospect was soon to be clouded by the Orders in Council of the 16th of November, 1807, and other subsequent orders, prohibiting all neutral trade with ports of France and her allies, or of any other country at war with Great Britain, and of all other ports in Europe from which the British flag was excluded, unless such trade should be carried on through the ports of Great Britain, under her licenses, and paying duties to her exchequer. The view which Mr. Pinkney took of this alarming state of affairs, will be seen by the following extract from his private letter to Mr. Madison, of the 7th of December, 1807.

* * * * *

“ Some American vessels have been *warned* under the orders of council, and permitted, after coming in, to proceed on their voyages, which, however, must now be full of danger.

"There is every probability that Sweden will, either willingly or unwillingly, soon unite with Russia in her measures against England; Austria is already said to be a party to them. The United States alone remain; and, as if it was desirable to cast off the friendship of all the world in this hour of their greatest peril, the British government persecutes us with the most injudicious, wanton, and extravagant aggression that ever was ventured upon by a nation in the arrogance of prosperity, and in the fullness of unquestioned power. I lament to say that this vile measure continues to be more popular than it ought to be. Most of the opposition with whom I have lately conversed, arraign it as foolish, rather than unjust; but in general it is approved. A portentous delusion seems to have taken possession of the nation. It was to have been expected that the affair of Copenhagen would have alarmed a moral and intelligent people by the prodigal waste of national character which it could not fail to produce, as well as by the horrible violence which it offered to every thing like principle, and even to the ordinary maxims of policy. It has, however, scarcely excited a murmur. It is, indeed, understood, that it will be assailed in Parliament by the late ministry and their adherents, except Thomas Grenville, and, perhaps, Lord Grenville. It is equally understood that this attack will end in nothing. If Lord Grenville should (as some assert, though I incline to think erroneously) support the Copenhagen business, it is believed that it will be the signal of his separation from a party with which he never has been cordial, and of an approaching union with the present ministers, who are said to desire extremely to bring Lord Grenville and the Marquis Wellesley into office.

"Since my letter of the 23d of last month, Mr. Bowdoin has put into my hands a copy of a letter from the French Minister of Justice, to the Procureur General of the Council of Prizes, dated the 18th of September last, with which General Armstrong has doubtless made you acquainted. I enclose a copy of it.*

* This rescript gave a different interpretation to the Berlin decree from what the Council of Prizes had at first given to it, when they had considered it as a mere municipal regulation, forbidding the entry of neutral vessels

"It is perfectly certain that the British government had no knowledge of this paper, when the Orders in Council were issued; and indeed that they have no knowledge of it even now. They have heard of certain declarations imputed to the Emperor of France at his levees, (with what truth I know not;) but these could hardly be considered as very certain indications of what would be done; far less as constituting in themselves a measure against which there could be actual retaliation through the rights of neutrals.

"The situation in which we are now placed by the violence and injustice of others is certainly an arduous one; but it will be met by our government with all the temper, wisdom, and virtue, which it so imperiously requires, and by our people with the patriotism which belongs to them.

"War between our country and Great Britain is not generally expected here. There is a disposition in many to anticipate some strong measure on our part, but not war; and it is taken for granted that Great Britain will not seek a war if we should stop short of actual hostility. The letters in the *Morning Chronicle* (from A. B. to the editor) which I have sent you as they have appeared, are from the pen of one of the ablest and warmest of our friends in England. They are not without great errors; but they speak with considerable exactness the sense of his party, the most favourable of any in this country to the United States."

* * * * *

In a letter, dated the 21st December, 1807, he says :

"I ought not, perhaps, to have been quite so scrupulous of writing to you on public affairs during the existence of the joint mission; but you will do me the justice to believe that the scruple was sincerely felt, and yielded to frequently with great

coming from England into French ports, and not authorizing seizures on the high seas of neutrals bound to or from British ports.

reluctance. You will now have reason, perhaps, to complain of me for writing rather too much than too little. I shall, however, continue in general to mark my letters "private," by which their freedom and frequency will be rendered innocent at least, if they shall not be useful.

" You will find that I have been careful to send you by every opportunity, newspapers, pamphlets, &c. since Mr. Monroe's departure ; as indeed I sometimes ventured to do before. May I beg that those from the United States may be sent with more regularity ? I ought to remark, that a pamphlet, favourable to British pretensions, and decrying our own, is no sooner published in America than it finds its way across the Atlantic, gets into general circulation here, and is quoted, praised, and sometimes republished ; whereas those of an opposite description either do not arrive at all, or come too late. Some pamphlets, of a most pernicious kind, having a British character strongly stamped upon them, have lately been imported from the United States, and advertised for republication by English booksellers. I should have been glad to see the antidote accompanying the poison. I am a sincere friend to peace with all the world, while it can be preserved with honour : but the strange productions to which I allude not only dishonour or betray the cause of our country, but tend, if read in Great Britain, to produce a temper unfriendly to accommodation ; and thus, while they inveigh against war, contribute to produce it. The effect of these works is greatly assisted by the wonderful ignorance which has prevailed, and still prevails, among all ranks of people in Great Britain, relative to the reciprocal conduct of France and the United States towards each other. The President's Message has, for that reason only, been almost universally misapprehended. Even our best friends have mistaken and complained of it. In the course of my private intercourse (as well with the opposition as with the friends of ministers) I have done all that was consistent with discretion, to give more correct notions on the subject ; but the press only can remove completely the prevailing error, and to that expedient it would be improper that I should have recourse. Some of the most distinguished men in England, however, have been referred to General Armstrong's letter to the French Minis-

ter of Marine, and the answer of that minister, as published in the American newspapers during the last winter, and to our Convention with France; and may, perhaps, do what I cannot. Their own newspapers prove in part the practice, (even now) under the French decree of November, 1806; and it is well known to many persons here, (notwithstanding the general ignorance) that France has never acted, and does not at this time act, upon the parts of the decree, which might seem intended for external operation, as maritime rules.

“ There are rumours of a schism in the cabinet (relative to the Catholics;) but I am told by a member of the late administration that it will come to nothing.”

In a letter to Mr. Madison, dated the 31st of December, 1807, he says:

“ Accounts from America begin to be regarded here with great interest, and to be remarked upon in rather an altered tone. I confess that I expect them myself with peculiar anxiety, although without a particle of doubt. The attitude which our government is now to take will fix our destiny for ever; and my trust is strong and confident that both will be worthy of the high name of our country.

“ In my public letters, I have ventured to intimate my opinions as to the conduct which the crisis demands from us. You will excuse me, I am sure, if in a private letter I speak with more freedom.

“ It will, I sincerely hope, be the solemn conviction of every man in America, (as it is mine) that it has become impossible, without the entire loss of our honour, and the sacrifice of every thing which it is our duty to protect, to submit in the smallest degree to that extravagant system of maritime-oppression, (proceeding more from jealousy of our rising greatness than from the motives actually avowed) by which Great Britain every day exemplifies in various modes the favourite doctrine of her infatuated advisers, that Power and Rightful Dominion are equivalent terms.

"No man can deprecate war upon light and frivolous grounds more sincerely than I should do. But if war arises out of our resistance to this pernicious career of arrogance and selfishness, which, while it threatens our best interests with ruin, is even more insulting than it is injurious, and more humiliating than it is destructive, can it be doubted that our cause is a just one, or that we shall be able and willing to maintain it as a great and gallant nation ought to do ?

"I have read, not without indignation, in American newspapers and pamphlets, that we are too feeble to assert our honour against the power of Great Britain, or to defend ourselves against her encroachments. This slander is not believed by those who publish it; but if it were true, instead of being immeasurably false, there are bounds to submission, beyond which even the feeble can submit no longer. Our government has shown a laudable solicitude for peace with all the world, and has acted wisely in its efforts to preserve it. But the time has arrived when it seems to be certain that we must either yield up all that we prize of reputation, of fortune, and of power, to the naval despotism of this country, or meet it with spirit and resolution; if not by war, at least by some act of a strong and decisive character.

"The argument against resistance to British aggressions, founded upon supposed danger from France, if Great Britain should be greatly weakened by that resistance, proves too much, and is otherwise false in fact and in reasoning. Without being blind to the enormous power and other dangerous attributes of the French government, I am persuaded that we have little to fear from France, and that it is practicable (as it is most emphatically our interest) to be at peace, without identifying ourselves with her

"It may be admitted, however, that France is a subject of apprehension to America as well as to Europe; but are we on that account to suffer with patience every wrong which Great Britain, stimulated by the jealousy of her merchants, or the avarice of her navy, or the pride of conscious power, may inflict upon us? Such a state of abject slavery to our fears, such a tame surrender of our rights, as the price of British protection against possible

and contingent peril, would be a thousand times more degrading than if we were now in the maturity of our years to return openly to the dependence of our colonial infancy upon the guardianship of the parent country. If we once listen to this base and pusillanimous suggestion, we have passed under the yoke and are no longer a nation of freemen ; we shall not only be despised and trampled upon by all the world, but, what is of infinitely more importance, we shall despise ourselves—France will justly become our irreconcilable enemy, and Great Britain will only be encouraged and enabled to stab to the heart the prosperity which she envies, and the power which she begins to dread. By a different course, that which suits with the manly character and the great resources of the American people, we shall show that we rely on ourselves for protection. We shall maintain, with the gallantry and firmness which have heretofore characterized us, our station among the powers of the earth. We shall check, while there is yet time, the usurpations of Great Britain without destroying her salutary strength. We shall diminish our dependence upon Europe by learning to supply our wants : and, while we give no cause of present hostility to France, we shall increase, by the necessary organization and development of our means of defence, our security from molestation from that and every other quarter.

“ The picture lately drawn by some American politicians of the sufferings which a war with Great Britain is to bring upon us, is such gross and ridiculous exaggeration that it can hardly deceive even the thoughtless and the timid. Great Britain will herself feel the tremendous effects of such a contest ; and I venture to prophecy will soon seek to end it ; but her late Orders of Council will injure us in peace as much as she can ever hope to injure us by war.

“ I have acknowledged in a postscript to my letter of the 29th, the receipt of your letter to Mr. Monroe of the 21st of October. I had read in the English newspapers, before Mr. Monroe’s departure, of the trial and execution of Radford, and of the trial of the other three seamen, but not of their punishment.* I do

* Seamen taken in the Chesapeake.

not know whether the instructions of Mr. Rose will enable him to offer any suitable atonement for this consummation of the guilt of Berkeley. The principal facts were known before the Statira sailed, and were, perhaps, suggested by Mr. Monroe to this government, as calculated to influence the nature and extent of the reparation. At any rate, it will not now be proper that I should move in this affair without further instructions.

"The opposition in the approaching session of Parliament, will be extremely active, particularly in the House of Lords, where the late ministers have more ability than in the Commons. The field is ample, and the topics interesting. The emigration of the royal family of Portugal has caused much idle exultation here; but the sober estimate now made of the advantage to Great Britain from that event is not quite so brilliant as the earlier calculations.

"It is whispered that the late schism in the cabinet, took its rise in a wish to bring Lord Grenville into power. He could not return while the Catholic question remained as he left it; and hence an attempt (by Mr. Canning, as it is said) to prevail upon the King to relax upon that point. The King was inflexible, and the affair has dropped.

"Mr. Rose (the Envoy) is the author of the report of the House of Commons, relative to the West Indies, which I sent you last summer. Mr. Percival and Lord Hawkesbury are the reputed authors of the new blockading plan. I should suspect Mr. George Rose (the elder) of a great share in it.

"The French government is said to have issued a new decree, (dated at Milan, November 25th,) under which the decree of November, 1806, will be executed according to its letter. I have not seen the decree, although it is in England; but it will probably be published in the *Courier* of to-night, which I will enclose. The French decree of the 18th of November, (dated at Fontainebleau,) you will see in the papers herewith sent.

"I beg you to pardon this long and hasty letter."

Private.

LONDON, *January 7th*, 1808.

"DEAR SIR,—I enclose a duplicate of my public letter of the 29th, and my private letter of the 31st of last month, to

which I am now able to add a copy of the French decree of the 23d (not, as I had supposed, the 25th) of November. This was sent to me by a Mr. Mitchell, who was proceeding to the United States (as he writes me) in an American vessel (the Ocean) with despatches for you from General Armstrong, when the vessel was captured by the Narcissus frigate, and sent into Plymouth, upon the ground that she took in a part of her cargo in France, (*salt* for ballast) after the day limited in the last British Orders in Council. I have thought it proper to interest myself informally in the case of this vessel, and I have assurance that it shall receive the promptest attention. I have advised Mr. Mitchell to wait a few days before he determines upon taking his passage in another vessel for America, by which he would be likely to lose time.

“ I sent you some days ago a newspaper containing the French retaliating decree, dated at Milan the 25th of December. Those which are now forwarded contain the same decree; and you will find by the papers of this morning that it has been followed up by another. This country has ventured upon an extraordinary struggle with France, by which she has every thing to lose and nothing to gain. The gross impolicy of the late Orders of Council, (to say nothing of their insulting tone, and their injustice to neutral states,) begins to develop itself, and will soon be manifest to all. I am greatly deceived if it will not in a few weeks be matter of surprise among all descriptions of people here, that a manufacturing and commercial nation like Great Britain, could have expected any thing but disaster and ruin from such a measure.

“ Hopes are entertained in England, that our Non-Importation Act will have been repealed upon the arrival of intelligence of an intended extraordinary mission from this country! That law passed upon unquestionable grounds of policy and justice; and, although it has been heretofore properly *suspended*, I do not see how our honour could fail to become a mere shadow, if it should now be abandoned even for a time. The mission of Mr. Rose would not seem to justify even the *suspension* of it, until the nature and extent of his powers were known; and after they were known, it could justify nothing. He has no power to arrange on the topic of impressment, the great founda-

tion of the Non-Importation Act ; and his government has not only re-asserted its obnoxious pretension on that subject in a public proclamation, but has even gone the length of declaring that it cannot consent to impair it. The unredressed outrages of Love, Whitby, &c., afford no inducement to repeal a law deliberately passed, with the clear approbation of the American people, when all the motives to its passage have received augmented force. But the late Orders of Council would make the repeal, or even the suspension, of the Non-Importation Act particularly unfortunate. The time when they were issued—the arrogant claim of maritime dominion which they suppose and execute—and the contempt which they manifest, in the face of the world, for the rights and the power of our country, make them altogether the most offensive act that can be laid to the charge of any government. The least appearance of a disposition to submit to such an attempt will encourage to further aggressions, until our national spirit will be lost in an habitual sense of humiliation, our character known only to be despised, and our rights considered, like those of the petty states of Europe, the sport and the prey of the strongest. There is an opinion here, that we are likely to become a divided people when a rupture with Great Britain is in question ; but this opinion is founded upon such American publications as those in a Boston paper, signed “*Pacificus*,” and upon some pamphlets and private letters of a similar character, and will, undoubtedly, be gloriously falsified, if there should be occasion, by the patriotism of our people in every quarter of the Union.

“*Private.*”

LONDON, *January 10th*, 1808.

* * * * *

“At a meeting on Thursday last of the committee of merchants trading to the United States, a memorial to government on the subject of the late orders, &c., was intended to be proposed, when to prevent the reading of it and a question upon it, a motion was made for an adjournment by Alderman Shaw, and carried (I think) 11 to 7. I have not seen this memorial, (as it has been wished and endeavoured to prevent it from getting abroad,) but a copy is now preparing for me, and (if of any in-

terest) I will send it to you as soon as obtained. I shall be much disappointed if a rupture with us will not become and decidedly appear to be more unpopular every day. Their trade and many of their manufactures are at a stand, and unexampled distress and strong remonstrances must speedily be the consequence."

In a letter to the same, of January 24th, 1808, he says :

"I send you a parcel of newspapers, to which I refer you for the debates in Parliament for the news of the day. The able speech of Lord Grenville, and the manly and eloquent protest of Lord Erskine will give you pleasure. The speeches of Mr. Wyndham and Mr. Eden in the House of Commons deserve your attention.

"The anxiety which has been for sometime past rapidly increasing relative to the United States is now very great and very general. The belief is every where entertained that we shall be found to have taken a strong attitude. A hope is, however, indulged that it will be short of war, and that the peace of the two countries may yet be preserved.

"I have not ceased in my intercourse with all parties to endeavour to diffuse (without losing sight of the manner) just notions as to the conduct which Great Britain ought, in prudence and in honour, to have observed towards us. Much ground has, undoubtedly, been gained ; but, impressively as events and strong demonstrations of wide-spread dissatisfaction here, begin to speak to this government, I fear that it is only from America that it can be completely enlightened. A dignified, firm, and temperate course on our part, must soon produce its proper effect on Great Britain, and I should hope on France also.

"The most friendly dispositions are constantly professed by ministers, and I am quite sure that they are averse from a war with us; yet the King's speech will satisfy you that there is no present intention of yielding any thing to our claims. In their treatment of myself personally, there is every manifestation of kindness and respect for our country. My reception on the

birth day, and at Mr. Canning's dinner in the evening, were such as I should have had reason to be perfectly satisfied with at any time. It has been mentioned to me, however, by a friend on whom I have great reliance, that Mr. Perceval in a late conversation observed, that although they did not wish, and would not seek, a war with the United States, yet that if we made such a war necessary, they would not, perhaps, much regret it, as a check to our maritime growth was becoming indispensable.

"The late Orders of Council will be assailed in Parliament as unconstitutional, as well as impolitic and unjust; and a strong protest will be entered on the journals of the Lords. I dined yesterday at Lord Erskine's with most of the distinguished members of the opposition; as I found them agreeing in such a view of this subject as British statesmen ought to adopt. The company consisted of the Duke of Norfolk, Lord Grenville, Earl Grey, Lord Chief Justice Ellenborough, Lord Lauderdale, Lord Holland, Lord H. Petty, Mr. Thomas Grenville, Mr. Tierney, Sir A. Pigot, Sir Samuel Romilly, Mr. Adam, Mr. Morris, (Lord Erskine's son-in-law) and myself. The utmost good will towards the United States was shown by them all. The Duke of Norfolk having compelled me to go first to dinner, said, as he followed me, that he was happy to have an opportunity of showing his respect, not only for my station, but for the government and country I represented.

"This little compliment (in answer to the usual disqualifying observation on my part) which I would not repeat if it had been personal, may be thought to derive a value from circumstances, and from the conspicuous worth, and high rank and influence of the Duke of Norfolk, and those by whom he was surrounded, which otherwise it certainly would not have.

* * * * *

"I have thought it proper to discourage, by the only prudent means in my power, the unnecessary stay of American vessels in British ports, or indeed in Europe; but there are, notwithstanding, a considerable number here. To urge their departure openly would have been too strong a step; but every other expedient has been tried. I have no immediate fears for their safety, but they would be better at home.

“ Prince Stahrenberg left England last week upon very short notice. It is said that the French government demanded his departure before the meeting of Parliament, and menaced Austria with war, if this demand were not complied with! He appears to have been more earnest in pressing the mediation of his court than was pleasing to this government; and it is known that he went away much dissatisfied. Mr. Alopeus has received his French passport, and will leave us soon. Jacobi has not yet received his.

“ Sir George Prevost goes out immediately to Halifax as Governor and Commander-in-Chief. It is believed to be certain that five thousand troops will be sent at the same time. A friend (whose intelligence is from a good source, but who may have made some mistake) has assured me that a *very large* additional force is in preparation for the British Northern colonies. I suspect he has misunderstood the conversation which he reports to me; but he speaks with confidence on the subject.

“ I believe I have omitted in my former letters to mention that I was told at Downing-street, some time since, that instructions had been sent to Mr. Erskine by the packet, upon the subject of the Orders of Council. What was the precise nature of the explanations with which these instructions have charged him, I did not inquire; but from what was stated to me, I presume that they could not be satisfactory.

“ I ought to mention that some of the opposition entertain hopes of producing a change of Ministry. This is not a topic, however, upon which I can now enlarge.

“ P. S. January 25th. I add to the parcel of newspapers, the *Morning Chronicle* and *Times* of this day, in which you will find another decree of the French government, enforcing with new sanctions and precautions, the decrees of the 23d of November and 17th of December last. Spain has echoed the last mentioned decree. The state of the world is full of embarrassments for us; but this consideration should only serve to augment our patriotism and our firmness. Nothing can better illustrate the impolicy of the British orders than these measures of France and Spain, for which they have furnished a pretext.”

In a letter to the same, of February 6th, 1808, he says :

“ You will observe that Mr. Perceval’s speech in the House of Commons, is studiously respectful to us, while he justifies, and avows their determination to support their new system. As a defence of that system, his speech is nothing. It is more happy in recrimination than in argument ; and having the former recommendation, the latter is absolutely unnecessary. I have always suspected that the late administration were entrapped, in an unguarded hour, into the order of the 7th January, 1807, by the then opposition, who now use it as a triumphant answer to all that can be said in Parliament against their own orders. It was, indeed, a most injudicious measure. It was liable to the reproach of being at once violent and feeble, unjust and disingenuous. It asserted a pretension most alarming to neutral nations, which had no rightful foundation ; and then was affected to be referred to another which could not cover what was done. Without losing the character of an usurpation, it had the air of artifice and contrivance. It violated the unquestionable rights of neutral commerce, while it professed the utmost tenderness for them ; and, while its actual provisions wore the appearance of inhibiting only the coasting trade of their enemies, (although, in fact, they did much more,) the preamble put forth such high claims for future use, as were in the end to leave no law upon the seas but force. It is probable, however, that this pernicious order was resorted to merely because it was believed to be necessary to do something bearing upon the French decree—that ministers wished its actual effects to be as small as possible—that the real extent of its interference with neutral rights was little understood, *except by those who formed it*—that the preamble contained all that ministers valued in the measure—and that they valued the preamble only as it was supposed to be calculated, without doing harm, to satisfy the public expectation of the day, and to silence the clamours of their opponents ! Be this as it may, the order is, as I have reason to know, sincerely repented of.

“ The sweeping blockade notified by the same ministers in

May, 1806, (from the Elbe to Brest inclusive,) was another of their sins, which tended to countenance, not only the British orders of the 11th of November last, but the French decree of November, 1806, according to its widest import. Besides, that the principle and object of that blockade would, if admitted, go to sanction almost any conceivable obstructions to the trade of neutrals, no adequate stationary force is believed to have been assigned to the maintaining of it in its details. It was, therefore, constructive in a very great degree, and must, indeed, from its nature and extent, have been so. Few men in this country of any party will suffer themselves to look back to this and similar abuses, as forming any apology or pretext for the subsequent declaration of France, but the actual ministers will not fail to derive from them what aid they can, (without, however, admitting them to be abuses,) in favour of their own measures. You will find these measures (however they may be rested upon an asserted right of war) assuming every day more and more of the genuine appearances of trading expedients. The new system will naturally and necessarily be (as their vast blockades, the creatures of modern times, have invariably been) made subservient, as far as it can, by licenses and regulations, to their own manufacturing, colonial, and commercial views, without any other regard to its professed object than such as will oppress us, by excluding our cotton, &c. from the continent. Even thus executed, it will be a desperate game, which, if persisted in, can only end in ruin.

"I mentioned to you, some time ago, that this government knew nothing of Regnier's letter of the 18th of September last, when the Orders of Council were issued. It is now certain that they knew nothing of it, until they received from America the National Intelligencer, in which it was published with the President's late message.

"I am in daily expectation of hearing from you. My situation will, I fear, become a little embarrassing, if you forbear much longer to send my credentials, or some precise instructions. I will make the best of it however. It is apparent that we gain ground here. The tone is altered. The Embargo has done much, although its motives are variously understood. Some

view it with doubt and suspicion. The government appears to put a favourable construction upon it; and all agree that it is highly honourable to the sagacity and firmness of our councils. Events which you could only conjecture when the measure was adopted, have already made out its justification beyond the reach of cavil. We shall, I trust, in the progress, be as faithful to our duty, as in the commencement of the crisis which has come upon us."

" Private.

LONDON, February 22d, 1808.

" DEAR SIR,—I have the honour to enclose a copy of Mr. Percival's bill for carrying the late Orders of Council into effect. It is intended, as I am told, to alter it in some respects. The clause which imposes an export duty on the cargoes of neutral vessels changing their destination is to be omitted. The cotton of the British colonies is to be placed in the same predicament, whatever that may be, with American cotton, and instead of a prohibitory duty upon the export of that article, it is, I believe, determined, in consequence of the pressing advice of those who affect to understand the subject, aided by the late discussions in Parliament, to prohibit directly the exportation of cotton; with a proviso, however, in favour of a licensing power in the King in Council, (of which I do not yet know the intended use,) and probably with an option to the neutral owner to export this commodity upon payment of the duty heretofore contemplated. The change will be attributed to, and is declared to proceed from, a respect for our feelings; but, unfortunately, the other parts of their system make this supposed respect of no value. This change in their plan has, indeed, been recently mentioned to me by Mr. Canning; but I declined (as I had before done, upon a similar proposal, as already explained to you) to make myself in any degree a party to it.

" You will find in the Resolutions, of which I have already sent you two copies (and which, after undergoing some alterations, are to form the table, A. B. and C. of the bill,) an export duty of 2s. 6d. stg. per bushel on foreign salt. The effect of this duty must be, and is intended to be, that the United States can no longer obtain their usual supply of that article (I think

about 300,000 bushels) from Spain and Portugal. Mr. Percival, calculating upon this effect, supposed that we must, of course, come here for British salt, not only to the amount heretofore taken by us, (I believe about 1,300,000 bushels,) but to the further amount of the supply heretofore obtained by us from Spain and Portugal, and perhaps more. Having thus, as he supposes, (without, by the bye, reflecting upon the difficulty of preventing us from procuring what salt we think fit from the Bahamas, &c. and upon the danger of our being induced to make it for ourselves,) created an absolute necessity for our taking between two and three millions of bushels at least of British salt, his plan is to take advantage of that necessity and lay an export duty upon it of 3d. stg. per bushel. I have some doubts of his being able to make this strange attempt acceptable to Parliament, but he seems bent upon trying it.

“As to the commodities of France, Spain, Holland, &c. imported into this country for exportation, they are charged with heavy duties upon re-exportation to the United States, which we, as the consumers, are, of course, to pay. But if the same commodities are re-exported to a British colony in America, &c. most of them are exempted from these duties by a proviso in the Bill. Thus a tribute is to be imposed upon us, which they do not choose to impose upon their own colonies, some of them in our immediate neighbourhood; and authorized to trade with us by land or inland navigation in those commodities, so long as we do not entirely prohibit their importation. They will annoy their enemy at our expense, but not at their own.

“It was expected that all the articles, forming the surplus of our colonial importations, would be (as they are) subjected to high duties on passing through British ports to the Continent. But it has an odd appearance in a measure professed to be purely belligerent, and to be intended simply “to annoy the enemy,” that the like articles, of which France is supposed to stand so much in need, and of which the privation or enhanced price would so severely distress her, are exempted altogether from those duties, if they come from British colonies.

“You will find that a long section of the Bill touches our trade to the continent of Europe in East India articles. They must

not only come to England on their way, but must come to the port of London, &c. and afterwards pay high duties from which the Company's trade is free.

"As to the duties which the resolutions proposed to lay (as I mentioned in my last) upon tobacco, &c. they seem to be explained by one of the provisos of the Bill, to which I refer you.

"These laboured details are, after all, little more than shadows, unless indeed France should lend herself to this extravagant system, and the United States should follow her example. As this must be impossible, it follows that this gigantic plan of monopoly and tribute will sink into a smuggling scheme, by which the nation will be impoverished, corrupted, and dishonoured.

"Mr. Baring's book is in great credit here. It is read with avidity, and is doing good. Parts of it are highly meritorious. It was wished to bring it out sooner, but it was found to be impracticable. The author of "War in Disguise" (whom it is intended to bring into Parliament) is preparing an answer to it.

"The opposition in Parliament to the Orders in Council is powerful, and some have hopes that Ministers will be compelled to abandon them. It is certain that they are not cordially approved by all the cabinet; but Mr. Percival and some of his colleagues are, I believe, determined to go on with their experiment at all hazards. Lord Hawkebury is now supposed not to have had much, if any, share in them,

* * * * *

"P. S. Feb. 25. Mr. Percival has abandoned his proposed duty upon salt.

"You will perceive, by the Parliamentary Debates, that an arrangement is contemplated with Sweden for subjecting exports from that country to transit duties equivalent to those which will be imposed here.

"I now enclose a copy of Mr. Percival's Bill amended. I need not point out in what respects it differs from the first Bill. I enclose also copies of the papers just laid before Parliament

relative to America. They are misapprehended by the public, but will be explained in Parliament.

"You will not fail to observe that in Mr. P.'s amended bill, cotton, wool, yarn, and bark, are excepted from the benefit of the clause in the third page, (Clause B.) relative to vessels coming in under warning."

In a letter to Mr. Madison, dated the 25th of April, 1808, he says :

"Mr. Rose has sent me your private letter of the 21st of March, for which I am greatly indebted to you. I know, and sincerely regret, the state of your health; and therefore entreat you not to make any effort (beyond what may be absolutely necessary for the public service,) to write to me. I will take for granted your good will, and if you will suffer me to do so, will presume upon your esteem. Of course, I shall not be ready to think myself neglected, if I hear from you but seldom, and shall not relax in my communications, because indisposition, a press of business, or some other reason, prevents you from giving much attention to my letters; I will only stipulate for an occasional acknowledgment of them, so that I may know what have been received, and what have miscarried. I need not say that as much more as may be consistent with your convenience will be in the highest degree acceptable to me.

"I feel very sensibly the delicacy and kindness of the assurances which you are so good as to give me, that the purpose of nominating me to the permanent legation here was never for a moment suspended in the mind of the President. I am the more gratified by this evidence of his continuing confidence, because I have a firm persuasion that he will never have reason to repent it. I beg of you to say for me to him that I am truly grateful for this distinction.

"I enclose another copy of the instruction to British cruizers, mentioned and enclosed in my last.* Having been confined by

* Orders encouraging our citizens to violate the Embargo.

indisposition for some days, I cannot vouch that it has been actually issued ; but all information concurs to make it sufficiently certain. There is something extremely injudicious in this measure—to say no more of it. I do not suppose that we ought to consider it (or rather to appear to consider it) as offensive to us ; but undoubtedly an attempt in the face of the world, thus to set the people against the government and its laws, is an ungracious act, and rests upon a bad principle. The effect of this wise contrivance, in America, can only be to add to the vigilance of the government in guarding the law, and to render more conspicuous the just pride and the public spirit of our citizens by an open disdain of all foreign allurements to break it. Such an instruction manifestly reposes upon a foul libel on our patriotism ; and is such a sneer upon our honour, national and individual, as should give us virtue, if we had it not before, to resist the temptation which it offers to the worst of our passions.

* * * * *

“I send herewith Brougham’s speech on the Orders in Council,* another pamphlet which I have not read, and some newspapers. You will find in one of them the Report of an opinion of Sir James Mackintosh, as a Prize-Judge, which has drawn much attention here as a judicial anomaly.† In one of the numbers of the Times are some smart observations upon it.

P. S. I have just received my credentials, and your letter of the 8th of March by the packet, and have sent the customary note to Mr. Canning, requesting an interview, for the purpose of presenting them. The incident you mention was not the most

* Mr. Brougham’s Speech delivered at the bar of the House of Commons, on the 1st April, 1808, as counsel for the petitioners against the Orders in Council, before he became a member of Parliament.

† Mr P. here refers to the judgment of Sir James Mackintosh, then Recorder of Bombay, in the case of the *Minerva*, which will be found reported in the first volume of Mr Hall’s American Law Journal, p. 217. In this case, Sir J. Mackintosh declares that he did not consider himself bound, when sitting as a Prize Judge, by the King’s Instructions, any further than they were, in his opinion, consistent with the law of nations.

fortunate that could have happened ;* but I hope it will produce no bad effect here. I will endeavour to set it to rights without hazarding any thing.

"The freedom with which I hold it to be my indispensable duty to write to you, renders the delicate caution which the President uses on such occasions peculiarly proper in my case ; but if he should at any time think that the interests of the state require that publicity should be given to my despatches, I do not (because I ought not to) ask to be spared ; although certainly the publication of some of them during my stay in this country would cause me most serious embarrassment. My course will continue to be to write with candour, frequency and fidelity, and to throw myself upon the kindness and wisdom of those to whom my correspondence belongs. I shall do so without doubt or fear of any kind.

"P. S. April 26. Mr. Pickering's letter has just been sent to me by a friend in the city. I have not had time to read it ; but I hear it is spoken of as being rather too strong against the United States. Many copies of it are in town, and it will doubtless be re-printed in England. Have you prohibited the exportation of all pamphlets which uphold our rights and our honour ?"

"*Private.*

LONDON, April 27, 1808.

"DEAR SIR,—I saw Mr. Canning this morning, and taking for granted (as the fact was) that he was apprized of all that happened relative to my despatch of the 23d of November last, I thought it prudent to afford him an opportunity of showing the effect it had produced upon him, by leading to the subject myself, as being suggested by the American newspapers. He had evidently received an impression from the transaction (although he would have concealed it) which it was proper to remove. My explanation appeared, as it ought, to be completely satisfactory. I proposed, however, to give him one or two extracts from the letter in question, which he consented to receive, with professions that they were (as I take for granted they were) unnecessary.

* Alluding to the circumstance of the reading of one of his letters, with open doors in the Senate, it having been communicated confidentially.

I ought to say here, in justice to Mr. Canning, (if indeed it is not said with sufficient explicitness in the letter itself, as I think it is,) that he did not attempt, in the course of the interview to which it alludes, to enter into a regular discussion with me of the merits of the Orders in Council; expecting, as he certainly did, that I would present him a note on the whole subject, as I told him I should do, and declaring that he preferred a discussion in writing. Why I afterwards declined to present him such a note my despatch explains."

The solicitude of Mr. Pinkney to accomplish the intentions of his government, in seeking to remove, by pacific means, those obstacles which had been thrown in the way of neutral commerce, by the unjustifiable measures of the belligerent states of Europe, and his anxiety to vindicate the honour and rights of his country, will be apparent from the above extracts, and from the subsequent portions of his private correspondence with Mr. Madison which are given in the Second Part. These will be found to be highly interesting, and to throw great light upon the transactions of the times.*

But the year 1808 passed away without any adequate return for his zealous and persevering endeavours in the important mission with which he had been entrusted. In his letters to his more private friends, the effects of these cares upon his health and spirits are expressed with much sensibility, mingled with the strongest feelings of attachment to the scenes and companions of his youth. The two following letters to his brother,

* See PART SECOND, No. III.

will show the state of his mind at this interesting period.

"LONDON, April 28th, 1808.

"DEAR N.,—I received a few days ago your very short letter on a very large sheet of paper. I expected a volume, and was obliged to put up with half a dozen lines. This is not well. After all, it is so much clear gain to hear from you; and, giving you credit for good intentions and a good stock of affection, I thank you for your letter, which furnishes much evidence of both. I should have been gratified undoubtedly by a little intelligence about Annapolis, the health of friends, and so forth; but you will give me all these in your next letter; and so we will settle the account.

"I congratulate you on the growth of your daughter. She is, I doubt not, worthy of all your care—and will, I sincerely hope and trust, give you many a delightful hour, employed in watching her improvement, and cultivating and forming her mind and manners. The purest, the most completely unmixed of all our enjoyments; for even its anxieties are happiness!

"How does it happen that J. has not written to me? It is odd enough that I, who seem to have a host of friends, as kind as heart could wish, when I am in Maryland, appear to have none the moment I leave it. This is poor encouragement to travel. I think, if ever I live to get back to the *fontes et flumina nata*, this consideration will induce me to make a vow to quit them no more on any errand whatsoever. Even you recollect me only when some striking event forces me, as it were, upon you; and J. of course forgets me, because I keep no cash at the Farmers' Bank. Notwithstanding all this, remember me to him in the most affectionate manner. Tell him I think of him often. How I think of him he need not be told.

"I have been more frequently indisposed within the last six months, than has been usual with me. I am, indeed, just recovered from an attack. Too much employment and some inquietude may have laid me open to these indispositions. The climate does not suit me as well as it did. I hope to do better in future; but these warnings are not to be slighted.

" You have not mentioned the Governor in any of your letters. You must like him I am sure ; for he is of a liberal, generous temper. I do not meet with your newspapers as often as I could wish ; but, from those I have seen, the Governor's conduct appears to have been active, spirited, and judicious on every occasion that has occurred since his first appointment. It was to have been confidently expected that it would be so. His principles have always been those of ardent patriotism ; and his mind, naturally strong and vigorous, has been enlightened by great experience. In my letter to him by Mr. Rose, (which, as Mr. Rose did not go to Annapolis as he expected, was not perhaps delivered,) I asked to have the pleasure of hearing from him when he should have a leisure hour which he could not otherwise employ. Will you take an opportunity of intimating this to him ? Remind Mr. H. and Mr. D. of me. Tell them that they neglect me ; but that I remember them with as much cordial esteem as ever. Where is my friend, Mr. E. ? If you should see him, say to him for me a thousand kind things. Inform Mr. M. that I wrote to him last autumn ; but fear my letter miscarried. As to Mr. C. he has given me up entirely. There are many other friends of whom I could speak ; but I have not time. There is one, however, of whom I will find time to speak ; and to her I beg you to say that she shares in all the regard I feel for you."

" LONDON, *August 29th*, 1808.

" DEAR N.,—I have had the pleasure to receive your letter of the 16th of July, and am happy to see that you do not forget me.

I should reluctantly quarrel with your domestic felicity : but I might perhaps be in danger of doing so, if it appeared to engross you so entirely as to leave no leisure for a recollection now and then of us who are absent.

" The letter of which you speak, (enclosing one from Mrs. P.,) came safe to hand ; and if it had not, I should have invented half a dozen apologies for you. I know you so well, that, when you appear to neglect me, I am ready to throw the blame upon fortune, upon accident, (who are, I suspect, the same personages,) upon every thing, and every body, rather than upon you.

"My health *has been* rather worse than I wished it ; but I am now convalescent. A short absence from town, (my family are still out of town) sea-air and sea-bathing have put me up again.

"Such a result of my labours for the public, as you would flatter me with, would make me, I doubt not, the healthiest man in England. There is a sort of moral health, however, which crosses, and difficulties, and disappointments, tend very much to promote. I must endeavour to console myself with the opinion that I have laid in a good stock of that, while I was losing some of the other.

"After all this philosophising, I am half inclined to envy you the smooth, even tenour of your life. You are every way happy—at home—abroad. Nothing disturbs your tranquillity, farther than to show you the value of it.

"Beloved by your family—respected and esteemed every where—your official capacity acknowledged—your official exertions successful—what have you to desire? But I have been so tossed about in the world, that, although I am as happy at home as my neighbours, I can hardly be said to have had a fair and decent share of real quiet. The time may come, however, when I too shall be tranquil, and when, freed from a host of importunate cares, that now keep me company whether I will or not, I may look back upon the way I have travelled with a heart at ease, and forward with a Christian's hope. I suspect I am growing serious when I meant to be directly the reverse. Thus, indeed, it is with the great mass of our purposes.

"I am rejoiced that Annapolis holds up its head. In itself the most beautiful, to me the most interesting spot on earth, I would fain believe, that it is doomed to enjoy the honours of old age without its decrepitude. There is not a foot of ground in its neighbourhood which my memory has not consecrated, and which does not produce, as fancy traces it, a thousand retrospections that go directly to the heart. It was the scene of our youthful days. What more can be said? I would have it to be also the scene of my declining years.

"Tell J. that I would write to him if I could—but that I have scarcely leisure for this scrawl. He knows my affections, and will take the 'will for the deed.' I offer him through you, my

felicitations upon the stability and wholesome effects of the Farmers' Bank. Ask him why it is that I do not hear from him? All days are not discount days, and a man may be cashier of the Bank of England, and yet have a moment to spare to those who love him. I beg you to remember me to the Governor and to Dr. G., and to other friends."

In a letter to Mr. Madison, dated January 16th, 1809, speaking of the publication of his official letter of the 21st of September, 1808, on the subject of the embargo, which had been communicated confidentially to Congress, but had found its way to the press, he says :

"I regret that you should have felt a moment's concern on account of the publicity given to my letter. It cannot be of the least importance. I do not believe that it will injure my standing here; but if it should, it can only lead to my recall; and as a recall, under such circumstances, would not imply the disapprobation of my own government, it would give me no pain; and it would most certainly put me to no inconvenience. I need not say how much I value every testimony of your friendship and confidence; but if (as I hope and trust) you will have been called to the office of President, it is my most earnest request that you will not permit that kindness of which I have already had so many proofs, to stand in the way of your views for the public good generally, or for what I am sure will be the same thing, the strength and prosperity of your administration. Send me back to my profession, with your good wishes, whenever it shall be thought expedient, and be assured of my sincere and unalterable attachment."

In a letter to the same of August 19th, 1809, he says :

"It appears from the newspapers that Mr. Adams has been appointed minister to St. Petersburg. I rejoice at this appoint-

ment, for many reasons. While I am speaking of a new diplomatic station, will you forgive me if I intimate that the old can scarcely remain much longer on their present establishment? The salary is so dreadfully inadequate, that I am ruining myself here in spite of all the care I can take to avoid it; and I presume that General Armstrong is not better off at Paris, although the necessary expenses of Paris are less than those of London."

The following is a letter to his brother :

" LONDON, September 23d, 1809.

" DEAR N.,—I received, a few days ago, your letter of the 26th of June. I am much obliged to you for the intelligence given in a part of it, and still more for the kindness and affection which pervade the whole. A better choice of *Governor* could not, I should think, have been made. It must have been very agreeable to you, and I congratulate you upon it accordingly. I have not yet received the letter which you tell me I am to expect from the Governor and Council. I shall be happy to do all in my power to fulfil their wishes, whatever they may be. William is most fortunately fixed, and I have the utmost confidence that he will do well. If he does otherwise his condemnation will be great indeed. The children who are with me have shot up at a prodigious rate, and require much care and expense. Charles, who is a remarkably promising boy, has finished his preparatory course, and is now at Eton. Edward will be placed, after Christmas, at the school which Charles has left. The rest will continue to have masters at home.

" My anxiety to return does not diminish. On the contrary, it grows upon me, and I find it necessary to wrestle with it. You know that I have as many and as strong inducements to be contented here, as any American could have; but England is not Maryland; and foreign friends, however great, or numerous, or kind, cannot interest as like those of our native land, the companions of our early days, the witnesses and competitors of our first struggles in life, and the indulgent partakers of our sorrows and our joys! I trust that I have as little disposition as any man to repine at my lot, and I know that I endeavour to form

my mind to a devout and reverential submission to the will of God. Yet I cannot conceal from myself, that every day adds something to my cares and nothing to my happiness; that I am growing old among strangers; and that my heart, naturally warm and open, becomes cold by discipline, contracted by duty, and sluggish from want of exercise. These may be called imaginary ills; but there is another, which all the world will admit to be substantial—I speak to you in confidence—my salary is found by experience to be far short of the actual necessities of my situation. It was fixed at its present rate many years ago, when the style of living and the prices of articles would not bear a comparison with those of the present time. I have no right to complain, however; and, therefore, I write this for your own perusal merely.”

The following extract of a letter to Mrs. Ninian Pinkney, refers to a domestic misfortune which she had recently sustained :

“LONDON, June 24th, 1809.

“MY DEAR MADAM,—If I had not found it impossible to answer your letter by the return of the Pacific, it would have been answered. Business occupied my time, and anxiety my heart to the last moment. I would have cheated the last of these tyrants of an hour or two by conversing with you; but the first forbade it; and I had no choice but to submit. From this double despotism I am now comparatively free, and the use which I make of my liberty is to trespass on you with a few lines.

“I shall not condole with you on your late loss, though I am able to conjecture how keenly it has been felt; you have yourself suggested one of the consolations which best support the good under the heaviest of all human calamities: *We shall meet again in purity and joy the friends who are every day falling around us.* There is nothing which more effectually cheers the soul in its dark mortal pilgrimage than this noble confidence; life would, indeed, be a sad journey without it; the power of

death is in this view nothing ; it separates us for a season merely to fit us for a more exalted and holy communion. I have clung to this thought ever since I was capable of thinking, and I would not part with it for worlds ; it has assisted me in many a trial to bear up against the evil of the hour, and to shake off in some degree (for who can boast of having entirely escaped from) the influence of those passions that betray and degrade us. If I may dare to say so, it gives a new value to immortality, while it furnishes powerful incentives to virtue. You cannot, I think, have yet met with "Morehead's Discourses." One of his sermons turns upon the loss of children ; and he sets forth, with that eloquence, which comes warm from the heart, the softenings which this bitter affliction derives from religion. When you can get the Sermon read it ; in the mean time, the following short extract will please you. It is exquisitely beautiful ; and the best of our modern Reviews has quoted it as a soothing and original suggestion."

" ' We are all well aware of the influence of the world : We know how strongly it engages our thoughts, and debases the springs of our actions : we all know how important it is to have the springs of our minds renewed, and the rust which gathers over them cleared away. One of the principal advantages, perhaps, which arises from the possession of children, is that, in their society the simplicity of our nature is constantly recalled to our view ; and that when we return from the cares and thoughts of the world into our domestic circle, we behold beings whose happiness springs from no false estimates of worldly good, but from the benevolent instincts of nature. *The same moral advantage is often derived in a greater degree from the memory of those children who have left us.* Their simple characters dwell upon our minds with a deeper impression ; their least actions return to our thoughts with more force than if we had it still in our power to witness them ; and they return to us clothed in that saintly garb which belongs to the possessors of a higher existence. We feel that there is now a link connecting us with a purer and a better scene of beings ; that a part of ourselves has gone before us into the bosom of

‘ God ; and that the same happy creatures which here on earth
 ‘ showed us the simple sources from which happiness springs,
 ‘ now hover over us, and scatter from their wings the graces and
 ‘ beatitudes of eternity.’ ”

“ Who can read this passage without feeling his heart in unison with it ? It cannot be read without inspiring a pleasing melancholy, and lifting the mind beyond the low contaminations of this probationary state, ‘ To scenes where love and bliss immortal reign.’ ” * * *

Mr. Pinkney’s official communications with the British government, were supposed by some persons in this country to be deficient in that firmness and decided tone which would have been becoming an American minister whilst remonstrating against aggressions the most injurious and insulting. But his communications with that government, as to their manner, were dictated by the tenor of his instructions, which were of the most pacific and conciliatory character. His conduct in this respect was assailed in some of the public prints with great, and as he felt, unmerited severity. In the mean time, the compensation which he had received from the State of Maryland for his services in the business of the bank stock, together with the money he had saved from the professional earnings of his youthful days, had been absorbed in the expenses incident to the education of his children in a foreign country, and to the munificent and hospitable style of living which he had adopted in London, as becoming his public station, and necessary to re-

ciprocate the civilities he received from others. He alludes to these painful circumstances in a letter to Mr. Madison, dated August 13th, 1810, of which the following is an extract :

" Before I conclude this letter, I beg leave to mention a subject in which I have a personal interest. I am told, and, indeed, have partly seen, that I am assailed with great acrimony and perseverance in some of the American newspapers. It is possible that increasing clamour, though it can give me no concern, may make it convenient that I should be recalled ; and it certainly will not be worth while to make a point of keeping me here, for any time, however short, if many persons in America desire that it should be otherwise. I can scarcely be as useful to our country under such circumstances as I ought to be, and I have really no wish to continue for any purpose looking to my own advantage. If I consulted my personal interest merely, I should already have entreated your permission to return. The disproportion between my unavoidable expenses and my salary, has ruined me in a pecuniary sense. The prime of my life is passing away in barren toil and anxiety, and, while I am sacrificing myself and my family in the public service abroad, ill disposed or silly people are sacrificing my reputation at home. My affectionate attachment to you need not be mentioned. If its sincerity is not already manifest, time only can make it so, and to that I appeal. But by seeking to remain in office under you, against the opinion of those whose remonstrances will at least be loud and troublesome, if they are not reasonable and just, I should show a want of all concern for your character and quiet. I do *not* seek it therefore. On the contrary I pray you most earnestly to recall me immediately (the *manner* of it would, I am sure, be kind) if you find it in any way expedient to do so. Believe me I shall go back to my profession with a cheerful heart, and with a recollection of your unvarying kindness which nothing can ever impair. I should, indeed, look forward to retirement from official station with the deepest sorrow, if I supposed that in parting with me as a minister, you were to part with me also

as a friend. But the friend will remain—not for a season only, but always—and be assured that, though you will have many abler friends, you can have none upon whose truth and zeal you may more confidently rely. In a word, I do not at this moment request my recall, but I shall receive it without regret, if you, with better means of judging than I can have, should think it advisable. That I should remain here much longer is hardly possible; but I flatter myself that in forbearing at present to ask your consent to my return, I do not lose sight of the public good.

“ This is a very long letter and full of egotism—but it will have an indulgent reader, and will I know, be excused.”

‘ In an answer to this letter, dated October 30th, 1810, Mr. Madison says :

“ The personal sensibilities which your letter expresses, are far greater than I can have merited by manifestations of esteem and confidence which it would have been unjust to withhold. As a proof of your partiality, they ought not on that account to excite less of a return. As little ought your readiness to retire from your station, from the honourable motives which govern you, to be viewed in any other light than as a proof of the value which attaches itself to your qualifications and services. It is not to be denied that a good deal of dissatisfaction has issued through the press against some of your intercourse with the British government. But this could have the less influence on the Executive mind, as the dissatisfaction, where not the mere indulgence of habitual censure, is evidently the result of an honest misconception of some things, and an ignorance of others, neither of which can be lasting. I have no doubt that if your sentiments and conduct could be seen through media not before the public, a very different note would have been heard; and as little, that the exhibitions likely to grow out of the questions and discussions in which you are at present engaged, will more than restore the ground taken from you.”

During his residence as minister in Great Britain, Mr. Pinkney's attention was, among other

objects, directed to the magnificent scene of public industry which that country displays. He perceived that her manufacturing establishments were one of the main springs of her wealth and power, and witnessed with pleasure the rapid progress of those agricultural improvements which have contributed so much to the opulence and embellishment of the island. He was anxious that his own country should participate in the benefits derived from the advancement of these important arts. In a letter to Mr. Madison, dated August, 1809, he says :

“ As we are turning our attention to wool, I have added a tract lately published here, on the Merino and Anglo-Merino sheep, which may be of use. I trust that we shall continue to cultivate such manufactures as suit our circumstances. Cottons now, and woollens hereafter, must continue to flourish among us.”

Among other occasions of a similar character, he was present at the cattle show of that distinguished patron of agriculture, Lord Somerville, in the spring of 1810. After the business of the day, a very large company sat down to a public dinner, Lord Somerville in the chair. The premiums having been distributed, his lordship, among other toasts, gave—

‘ Mr. Pinkney, the American Minister ; and may harmony always prevail with those who speak the same language.’

Which was received with enthusiastic applause by the company.

Mr. Pinkney, in returning thanks for this mark of respect to himself, and to the country he represented, desired his Lordship and the company to be persuaded that he was very grateful for the unexpected notice which they had been so good as to take of the United States and their minister.

“ I thank you,” said he, “ in the first place, for my country, and I hope I shall not be thought very presumptuous, if led, or even misled, by my wishes, to conclude that personal kindness may have had some little share in prompting your conduct on this occasion, I venture to thank you for myself. I trust, my Lord, it is scarcely necessary for me to say how sincerely I join in the wish which has been so well received by the noblemen and gentlemen here present, that there may be perpetual good understanding between Great Britain and the United States. An American Minister has, in truth, no merit in anxiously desiring cordial friendship with this country on terms consistent with the honour of his own; and your lordship will allow me to rejoice that there do exist on both sides the most powerful and obvious inducements to cultivate such friendship. We need not trouble ourselves to inquire whether it be true, as some politicians have pretended, that interest is the only tie of sufficient strength to hold independent nations together as friends, for we are fortunately bound in amity by all sorts of ties, which I fervently hope we shall not, even if it were possible that we should be so disposed, be strong enough to break. No reflecting and impartial man can doubt, that the true interests of Great Britain and America are compatible in all cases, the same in most. A liberal and comprehensive view of these can lead to no other conclusion than that they are calculated to cherish and invigorate each other. But a sense of this compatibility and identity of interests, effectual as it ought to be in communicating a character of steady friendship to our relations, is not the only pledge of harmony between us; for a thousand kindly influences, with which calculation has no concern, combine to form an auxiliary pledge, little inferior in strength, I should hope, and far superior

in moral beauty, I am sure, to the other. These influences, my lord, it would be a pleasing, and perhaps not unprofitable, task to review in detail, and by reviewing, to give them freshness, and augmented activity, for the noble and salutary purposes of peace and kindness. But I have already trespassed too long on your indulgence, if, indeed, I have not trespassed upon that discretion which so emphatically becomes my situation. I beg leave to drink the health of your lordship, &c."

In the following letter to Mr. Madison, Mr. Pinkney solicited his recall with more earnestness than he had hitherto done. The motives which induced him to decline remaining any longer in the public station which he had occupied, are fully explained in this letter.

"LONDON, Nov. 24, 1810.

"DEAR SIR,—I send by this opportunity to the Secretary of State, a letter, entreating your permission to return to America. I have not thought it necessary to mention in that letter my motives for this apparently abrupt request; but you will, I am sure, be at no loss to conjecture them.

"I ask your leave *at this time* to close my mission here, because I find it impossible to remain. I took the liberty to suggest to you in my letter by Mr. Ellis, that I was not unwilling, though I had no desire, to continue a little longer; but, upon a recent inspection of my private affairs, it appears that my pecuniary means are more completely exhausted than I had supposed, and that to be honest I must hasten home.

"The compensation (as it is oddly called) allotted by the Government to the maintenance of its Representatives abroad is a pittance, which no economy, however rigid, or even mean, can render adequate. It never was adequate I should think; but it is now (especially in London) far short of that just indemnity for unavoidable expenses which every government, no matter what its form, owes to its servants.

"I have in fact been a constant and progressive loser, and at length am incapable of supplying the deficiencies of the public allowance. Those deficiencies have been hitherto supplied by the sacrifice of my own capital in America, or by my credit, already pushed as far as the remnant of that capital will justify, and I fear somewhat farther. I cannot, as an honourable man, with my eyes open to my situation, push it farther, and of course I must retire. I do not mean to exaggerate the amount of my capital thus dissipated in a thankless office. It was not very large—it *could not* be so. I have spent too much of my life (how faithfully none will have the injustice to question) in the public service, to admit of *that*. But such as it was, it had its value as a stake, in case of accidents, for those about me, and being now gone, cannot hereafter eke out a scanty salary. It is superfluous to say that I have no other resource.

"This is the consideration which has urged me to write for my recall *at this moment*.

"There are others, however, which ought, perhaps, to have produced the same effect at even an earlier period, and *would* have produced it, if I had followed my own inclinations rather than a sense of duty to you, and to the people. Some of these considerations respect myself individually, and need not be named; for they are nothing in comparison with those which look to my family. Its claims to my exertions for its benefit in my profession have been too long neglected. Age is stealing fast upon me, and I shall soon have lost the power of retrieving the time which has been wasted in endeavours (fruitless it would seem) to deserve well of my country. Every day will, as it passes, make it more difficult to resume the habits which I have twice improvidently abandoned. At present, I feel no want of cheerful resolution to seek them again as old friends which I ought never to have quitted, and no want of confidence that they will not disown me. How long that resolution, if not acted upon, may last, or that confidence may stand up in the decline of life, I cannot know and will not try."

"I trust it is not necessary for me to say how much your kindness, and that of your predecessor, has contributed to subdue the anxieties of my situation, and to make me forget that I ought

to leave a post, at once so perilous and costly, to richer and to abler hands. Those who know me will believe that my heart is deeply sensible of that kindness, and that my memory will preserve a faithful record of it while it can preserve a trace of any thing.

“ I am in danger of making this a long letter. I will only add to it, therefore, that I shall prepare myself (in the expectation of receiving your permission) to return to the United States as soon as the season will allow me to do so with convenience to my family ; and that, if my duty should, in any view of it, require a more prompt departure, I shall not hesitate to act as it requires.”

Mr. Pinkney continued still to press upon the British government the complaints of this country, until finding that no attention was likely to be paid to his remonstrances, he demanded an audience of leave in pursuance of the President's instructions. On the last of February, 1811, he had his audience of leave at Carlton House, and stated to the Prince Regent the grounds upon which it had become his duty to take his leave, and expressed his regret that his efforts to set to rights the embarrassed and disjointed relations of the two countries had wholly failed, and that he saw no reason to expect that the great work of reconciliation was likely to be accomplished through any other agency.

He soon after embarked for the United States in the frigate *Essex*, and arrived at Annapolis in June, 1811. On his arrival in this country he

immediately resumed the labours of his profession with his accustomed alacrity and ardour.

In September, 1811, he was elected a member of the Senate of the state of Maryland.

In the following December, Mr. Madison tendered him the appointment of Attorney General of the United States, which he accepted in the following letter :

“ ANNAPOLIS, Dec. 17, 1811.

“ DEAR SIR,—I had the honour to receive, *late last night*, the letter which you were so good as to write to me on the 12th, and at the same time my Commission as Attorney General of the United States. I shall not delay a moment in repairing to Washington, after a few importunate engagements here have been satisfied ; and I hope to set out in a few days.

“ Permit me to thank you again for the great kindness and delicacy with which this appointment has been tendered to me, and to assure you that if I should fail to justify your choice by an able discharge of my official duties, I shall at least prove that I know how to discharge the duties of gratitude and friendship.”

In a subsequent letter to Mr. Madison, he says :

“ I have received a letter from Mr. Dallas, from which it appears that he has not been applied to by Mr. Gallatin to assist in the cases in the Supreme Court, in which it was thought his aid would be advisable ; and further, that he would be willing to assist, if applied to. Although I shall be perfectly prepared to argue one of them, (the case of the French national vessel,) it will be a great gratification to me to have him for an assistant in both. I take the liberty to submit it to your consideration whether an early application to him would not be well, if it is intended to retain him at all.

"I find an immense mass of business in the Supreme Court in which the government is concerned; but I hope to get through with it at the ensuing term. The Committee of Claims has referred Beaumarchais' case to me *upon the law of it*. It perplexes me exceedingly; for *in strict law* the discount cannot well be maintained, and yet in all righteousness it ought to be insisted on—at least there seems to be the strongest probability that it ought."

The case of the French national vessel referred to in the above letter, involved a very interesting question of international law. The Exchange was originally a merchant ship, belonging to citizens of this country, which had been seized by the emperor Napoleon under his decree issued at Rambouillet, armed and commissioned in his service, and sent to carry despatches to the East Indies. In the course of her voyage, she touched at the port of Philadelphia, being in distress, and our waters being at that time open to the ships of war of all the belligerent powers. She was there proceeded against by the original American owners, who reclaimed their property in the ordinary course of justice, and the cause was finally brought before the Supreme Court; the French Minister having insisted in his correspondence with our government that the justice and legality of the original seizure was a question of state to be settled by diplomatic negotiation between France and the United States; and that it could not be determined by the ordinary tribunals of justice, especially as the vessel had entered a port

of this country under the general permission to the public ships of foreign nations. The same principle of exemption from judicial cognizance, for the vessel thus entering our waters, was also maintained by Mr. Pinkney, as Attorney General, with a force of argument and eloquence, and an extent of learning, which raised him at once in the public estimation, to the head of the American bar.

He reasoned to show that where wrongs are inflicted by one nation upon another, in tempestuous times, they could not be redressed by judicature ; that where the private property of a citizen had been ever so unjustly confiscated in the tribunals of a foreign state, a regular judicial condemnation closes the judicial eye upon the enormity of the original seizure ; and still less could the courts of justice interfere where the sovereign rights of a foreign prince had intervened. He compared the case in judgment to the analogous exemption (under the law of nations) from the local jurisdiction of the country, of the person of the sovereign, of his ministers, or his fleets and armies, coming into the territory of another state, by its permission, express or implied. He insisted upon the equality of sovereigns, and that they could not submit their rights to the decision of another sovereign, or his courts of justice ; but that the mutually conflicting claims of independent states must be adjusted by diplomatic negotiation, or reprisals and war ; that no reprisals had been authorized by our

government in the present instance, and that the general provisions of the laws descriptive of the ordinary jurisdiction of the national courts to redress private wrongs, ought not to be so interpreted as to give them cognizance of a case in which the sovereign power of the nation had, by implication, consented to waive its jurisdiction. These topics of argument, which were made the grounds of the decision pronounced by the court, he amplified and illustrated by a variety of considerations, drawn from the impotency of the judicial power to enforce its decisions in such cases; from the exclusive competence of the sovereign power of the nation adequately to avenge wrongs committed by a foreign sovereign, and to determine when it shall assert, and when it may compromise its extreme rights; from the nature of the questions growing out of such transactions, as being rather questions of state policy than of jurisprudence, of diplomatic than of forensic discussion.

It was a rash assertion of an illustrious writer, that there are no discoveries to be made in moral science and in the principles of government. To say nothing of other improvements which the present age has witnessed, mankind are indebted to America for the discovery and practical application of a federative scheme of government, which combined with the representative system,

and avoiding the inherent defects of all preceding confederacies, it is consolatory to believe, may yet diffuse the blessings of liberty over the civilized world, and by the establishment of a new and more perfect social order, promote the happiness of the human race more than any other invention of modern times. The organization of the judicial power is one of the most curious and nicely adapted parts of this admirable scheme of government. Its highest appellate tribunal is invested with an imposing combination of authorities. Besides its extensive powers as an ordinary court of justice, it administers the law of nations to our own citizens and to foreigners; and determines, in the last resort, every question (capable of a judicial determination) arising under our municipal constitution, including the conflicting pretensions of the state and national sovereignties. It is before "this more than Amphictyonic council," that the American lawyer is called to plead, not merely for the private rights of his fellow-citizens, but for their constitutional privileges, and to discuss the conflicting pretensions of these sovereignties. Generally speaking, the practice of the bar in this country is not confined to particular courts. Our lawyers not being restricted to any peculiar department of the profession, their technical learning is usually of a more liberal and expansive cast than in the country from whence we have derived our legal institutions. Their professional habits and studies do not unfit them in any degree for the perform-

ance of the higher and more important functions of statesmen and legislators. There can be no doubt that in England, greater skill and nicety of execution are acquired by the minute subdivision of labour which the state of the profession and the condition of society have produced. Hence we find there more perfect matters of the science of equity, of special pleading, or of the civil and canon laws as they are administered in the Admiralty and Consistorial courts. But the peculiar circumstances and condition of this country have roused the latent faculties of the people, and given a greater flexibility and variety to the talents of its public men ; whilst they have enabled our most eminent lawyers, when called unto the public service, to perform all the offices of peace and war with as much ability and success as in those countries where youth are prepared for the duties of public life by a peculiar system of education exclusively adapted to that purpose. They have liberalized their minds by the study of general jurisprudence ; and when removed from the bar into the cabinet or senate, have, generally, been found to sustain the reputation which they had acquired in a more limited walk. The infancy of the country, and the perfect freedom of its political institutions, have contributed to this result. Society is not broken into those marked distinctions and gradations of rank and occupation, which demand a correspondent separation of mere professional employments, from those connected with the business of the state ; whilst, at the

same time, the bar, as in the ancient republics, is the principal avenue to public honours and employments. These circumstances, combined with the singular nature of the jurisdiction of the Supreme Court as administering the Political Law, have advanced the science of jurisprudence in the United States far beyond the general condition of literature, and have raised the legal profession to a higher rank in public estimation than it enjoys in any other nation.

At the same session of the court, when the case of the *Exchange* was discussed, the much agitated question whether the United States, considered as a federal government, have an unwritten or common law, which may be administered in the courts of the Union, in criminal and other cases, in the absence of any statutory provision, arose in the case of an indictment for a libel on the President and Congress. The Attorney-General (Mr. Pinkney) and the counsel for the defendant both declined arguing the question, for some reason which does not appear. But I am told that Mr. Pinkney had formed, and frequently expressed, a very decided opinion that the courts of the Union possessed a common law jurisdiction; though I have not been able to learn what were the grounds of this opinion, or the limitations he would have admitted to the views which are attributed to him. The court pronounced its judgment for the defendant, a majority of the judges present being of the opinion that it had not jurisdiction of the case. But it seems that

the question is not yet considered as at rest, the court having, in a subsequent case, which came on for hearing in 1816, expressed a willingness to listen to an argument upon it, notwithstanding the former decision.

The whole subject has been recently discussed, in a very able and elegant work, by Mr. Dupon-ceau. He considers that there would have been little difficulty in solving the problem, if in stating it, the ambiguous terms *common law jurisdiction* had not been used; which he conceives are susceptible of a double interpretation, implying in the one sense a jurisdiction which may be lawfully assumed; and in the other a power in direct opposition to the letter and spirit of the national constitution: so that the controversy has been to maintain or reject altogether this *common law jurisdiction*, in every sense in which the terms may be used, whilst a proper distinction would have reconciled all conflicting opinions upon the subject. In England, the common law is the *source* of jurisdiction to all the courts. In this country, it is no longer the source of power or jurisdiction, but the *means* or instrument through which it is exercised. The common law is a *system of jurisprudence*, and nothing more. From the common law, considered as a *source of power*, no jurisdiction can arise to any court of justice in this country, state or national; but considered as a *means for the exercise of power*, every lawful jurisdiction may be exercised through its instrumentality, and by its proper application.

Having thus disarmed the common law of its only dangerous attribute, what he calls the *power giving capacity*, Mr. Duponceau proceeds to argue with great acuteness and ingenuity, that considered as a *system of jurisprudence*, it is the national law of the Union, as well as that of the particular States. It would be wandering too far from the subject of the present publication to enter into a critical examination of his reasonings; but it may not be improper to remark that the same distinction seems to have been held in view by Mr. Justice Story in *Coolidge's case*,* although the proposition is not enunciated in such formal terms, or so elaborately discussed as by Mr. Duponceau, the nature of the case being such that the jurisdiction might more properly be considered as resting upon the Admiralty powers of the Court, than upon its general common law authority to punish offences against the United States.

In the political controversies which grew out of the Declaration of War with Great Britain in 1812, Mr. Pinkney took a very decided and zealous part. The following extracts from a pamphlet written by him, and addressed to the people of Maryland, under the signature of *Publius*, in

* Gallison's Reports, vol. I. p. 488.

1813, will show his views and feelings upon the momentous question which then agitated the public mind.

“ But it is impossible that, in weighing the merits of a candidate for a seat in the General Assembly, you should be occupied by considerations which are merely local. You are bound to give to your inquiries a wider range. You neither can, nor ought, to shut your eyes to the urgent concerns of the whole empire, embarked as it is in a conflict with the determined foe of every nation upon earth sufficiently prosperous to be envied. Maryland is at all times an interesting and conspicuous member of the Union; but her relative position is infinitely more important now than in ordinary seasons. The war is in her waters, and it is waged there with a wantonness of brutality, which will not suffer the energies of her gallant population to slumber, or the watchfulness of her appointed guardians to be intermitted. The rights for which the nation is in arms, are of high import to her as a commercial section of the Continent. They cannot be surrendered or compromised without affecting every vein and artery of her system; and if the towering honour of universal America should be made to bow before the sword, or should be betrayed by an inglorious peace, where will the blow be felt with a sensibility more exquisite than here in Maryland?

“ It is perfectly true that our State government has not the prerogative of peace and war; but it is just as true that it can do much to invigorate or enfeeble the national arm for attack or for defence; that it may conspire with the legislatures of other States to blast the best hopes of peace, by embarrassing or resisting the efforts by which alone a durable peace can be achieved; as it may forward pacific negotiation by contributing to teach the enemy that we who, when our means were small, and our numbers few, rose as one man, and maintained ourselves victorious against the mere theories of England, with all the terrors of English power before us, are not now prepared to crouch to less than the same power, however insolently displayed, and to

receive from it in perpetuity an infamous yoke of pernicious principles, which had already galled us until we could bear it no longer.

“ That the war with England is irreproachably just, no man can doubt who exercises his understanding upon the question. It is known to the whole world, that when it was declared, the British government had not retracted or qualified any one of those maritime claims which threatened the ruin of American commerce, and disparaged American sovereignty. Every constructive blockade, by which our ordinary communication with European or other ports had been intercepted, was either perversely maintained, or made to give place only to a wider and more comprehensive impediment. The right of impressment, in its most odious form, continued to be vindicated in argument and enforced in practice. The rule of the war of 1756, against which the voice of all America was lifted up in 1805, was still preserved, and had only become inactive because the colonies of France and her allies had fallen before the naval power of England. The Orders in Council of 1807 and 1809, which in their motive, principle, and operation, were utterly incompatible with our existence as a commercial people; which retaliated with tremendous effect upon a friend the impotent irregularities of an enemy; which established upon the seas a despotic dominion, by which power and right were confounded, and a system of monopoly and plunder raised, with a daring contempt of decency, upon the wreck of neutral prosperity and public law; which even attempted to exact a tribute, under the name of an impost, from the merchants of this independent land, for permission to become the slaves and instruments of that abominable system; had been adhered to (notwithstanding the acknowledged repeal of the Berlin and Milan decrees in regard to the United States) with an alarming appearance of a fixed and permanent attachment to those very qualities which fitted them for the work of oppression, and filled us with dismay. Satisfaction, and even explanation, had been either steadily denied, or contemptuously evaded. Our complaints had been reiterated till we ourselves blushed to hear them, and till the insolence with which they were received recalled us to some sense of dignity.

History does not furnish an example of such patience under such an accumulation of injuries and insults.

"The Orders in Council were indeed provisionally revoked a few days after the declaration of war; in such a manner, however, as to assert their lawfulness, and to make provision for their revival, whenever the British government should think fit to say that they ought to be revived. The distresses of the manufacturing and other classes of British subjects had, at last, extorted from a bigotted and reluctant cabinet what had been obstinately refused to the demands of justice. But the lingering repeal, inadequate and ungracious as it was, came too late. *The Rubicon had been passed.*"

* * * * *

" 'Nothing is more to be esteemed than peace,' (I quote the wisdom of Polybius,) 'WHEN IT LEAVES US IN POSSESSION OF OUR HONOUR AND RIGHTS; but when it is joined with loss of freedom, or with infamy, nothing can be more detestable and fatal.' I speak with just confidence, when I say, that no federalist can be found who desires with more sincerity the return of peace than the republican government by which the war was declared. But it desires such a peace as the companion and instructor of Scipio has praised—a peace consistent with our rights and honour, and not the deadly tranquillity which may be purchased by disgrace, or taken in barter for the dearest and most essential claims of our trade and sovereignty. I appeal to you boldly: Are you prepared to purchase a mere cessation of arms by unqualified submission to the pretensions of England? Are you prepared to sanction them by treaty and to entail them upon your posterity, with the inglorious and timid hope of escaping the wrath of those whom your fathers discomfited and vanquished? Are you prepared, for the sake of a present profit, which the circumstances of Europe must render paltry and precarious, to cripple the strong wing of American commerce for years to come, to take from our flag its national effect and character, and to subject our vessels on the high seas, and the brave men who navigate them, to the municipal jurisdiction of Great Britain? I know very well that there are some amongst us (I hope they are but few) who are prepared for all this and more; who pule over every scratch occasioned by the war as if it were

an overwhelming calamity, and are only sorry that it is not worse ; who would skulk out of a contest for the best interests of their country to save a shilling or gain a cent ; who, having inherited the wealth of their ancestors without their spirit, would receive laws from London with as much facility as woollens from Yorkshire, or hardware from Sheffield. But I write to the great body of the people, who are sound and virtuous, and worthy of the legacy which the heroes of the revolution have bequeathed them. For *them*, I undertake to answer, that the only peace which they can be made to endure, is that which may twine itself round the honour of the people, and with its healthy and abundant foliage give shade and shelter to the prosperity of the empire.

“ I passed rapidly in a former number over the justifying causes of the war. But you must permit me in this place, and for a single instant, to recur to one of them, as introductory to a consideration which you will do well to lay to your hearts when you are assembled at the polls. The foundation upon which the claim of Great Britain reposes, to send a press-gang on board of our ships upon the ocean, as if they were the docks or the ale-houses of Liverpool, is simply the right of the crown, as it is recognized by her laws, to the services of every subject in time of war. The doctrine amounts to this, that a man born within the British dominions is, in a qualified sense, the property of the government, in virtue of an artificial and slavish notion of perpetual allegiance ; that, though he may have been forced by poverty or persecution to emigrate, and has become the citizen or subject of another state, his allegiance cleaves to him for life ; that no time, or distance, or sanctuary, or new obligations can save him from its mysterious and inextinguishable power ; and that, of course, he may be seized wherever and whenever he can be found.

“ But the abominable doctrine is associated with another, which says, that although no state can be suffered to hold British seamen in its service by naturalization or otherwise, Great Britain may encourage the seamen of other states, to enter into her service, and may keep them there till she wants them no longer ! And, that nothing may be wanting to the consistency of the

British doctrine on this head, it goes on to maintain that if a foreign seaman should happen to marry and settle (as it is phrased) in an English port, he may be impressed as an English sailor, and may be retained as such against his own remonstrance, seconded by that of his country !

“ In the execution of the first of those rules, which the associated rules so pointedly discountenance, our vessels were stopped on their lawful voyages, and their mariners taken away by violence upon the bare allegation, whether true or false, that they were British subjects. Many of these persons were native Americans, many of them were neutral Europeans over whom Great Britain had no lawful control, and many more were fairly entitled to be considered as American seamen, according to the law which Great Britain had (as I have already stated) laid down and enforced against us and the rest of the world. It was impossible that, with the best disposition, such a rule should be made to act only on the professed objects of it. But it was often exercised with wanton tyranny by proud and upstart surrogates in naval uniform ; and the abuses grew to be enormous and intolerable. The approach of a British cruiser, in the bosom of peace, struck a terror into our seamen which it cannot now inspire, and almost every vessel returning from a foreign voyage, brought affliction to an American family, by reporting the impressment of a husband, a brother, or a son. The government of the United States, by whomsoever administered, has invariably protested against this monstrous practice, as cruel to the gallant men whom it oppressed, as it was injurious to the navigation, the commerce, and the sovereignty of the Union. Under the administration of Washington, of Adams, of Jefferson, of Madison, it was reprobated and resisted as a grievance which could not be borne ; and Mr. King, who was instructed upon it, supposed at one time that the British government were ready to abandon it, by a convention which he had arranged with Lord St. Vincent, but which finally miscarried. You have witnessed the generous anxiety of the late and present chief magistrate to put an end to a usage so pestilent and debasing. You have seen them propose to a succession of English ministers, as inducements to its relinquishment, expedients and equivalents of

infinitely greater value to England than the usage, whilst they were innocent in themselves and respectful to us. You have seen these temperate overtures haughtily repelled, until the other noxious pretensions of Great Britain, grown in the interim to a gigantic size, ranged themselves by the side of this, and left no alternative but war or infamy. We are at war accordingly, and the single question is, whether you will fly like cowards from the sacred ground which the government has been compelled to take, or whether you will prove by your actions that you are descended from the loins of men who reared the edifice of American liberty, in the midst of such a storm as you have never felt.

"As the war was forced upon us by a long series of unexampl'd aggressions, it would be absolute madness to doubt, that peace will receive a cordial welcome, if she returns without ignominy in her train, and with security in her hand. The destinies of America are commercial, and her true policy is peace; but the substance of peace had, long before we were roused to a tardy resistance; been denied to us by the ministry of England; and the shadow which had been left to mock our hopes and to delude our imaginations, resembled too much the frowning spectre of war to deceive any body. Every sea had witnessed, and continued to witness, the systematic persecution of our trade and the unrelenting oppression of our people. The ocean had ceased to be the safe high-way of the neutral world; and our citizens traversed it with all the fears of a benighted-traveller, who trembles along a road beset with banditti, or infested by the beasts of the forest. The government, thus urged and goaded, drew the sword with a visible reluctance; and, true to the pacific policy which kept it so long in the scabbard, it will sheathe it again when Great Britain shall consult her own interest, by consenting to forbear in future the wrongs of the past.

"The disposition of the government upon that point has been decidedly pronounced by facts which need no commentary. From the moment when war was declared, peace has been sought by it with a steady and unwearied assiduity, at the same time that every practicable preparation has been made, and every nerve exerted to prosecute the war with vigour, if the enemy should persist in his injustice. The law respecting seamen, the

Russian mission, the instructions sent to our chargé d'affaires in London, the prompt and explicit disavowal of every unreasonable pretension falsely ascribed to us, and the solemn declarations of the government in the face of the world, that it wishes for nothing more than a fair and honourable accommodation, would be conclusive proofs of this, if any proofs were necessary. But it does not require to be proved, because it is self-evident. What interest, in the name of common sense, can the government have (distinctly from that of the whole nation) in a war with Great Britain? It is obvious to the meanest capacity that such a war must be accompanied by privations, of which no government would hazard the consequences, but upon the suggestions of an heroic patriotism. The President and his supporters have never been ignorant that those who suffer by a war, however unavoidable, are apt rather to murmur against the government than against the enemy, and that while it presses upon us we sometimes forget the compulsion under which it was commenced, and regret that it was not avoided with a provident foresight of its evils.

"It will, therefore, be no easy matter to persuade you that this war was *courted* by an administration who depend upon the people for their power, and are proud of that dependence; or that it will be carried on with a childish obstinacy when it can be terminated with honour and with safety. You have, on the contrary, a thousand pledges that the government was averse to war, and will give you peace the instant peace is in its power. You know, moreover, that the enemy will not grant it as a boon, and that it must be wrung from his necessities. It comes to this, then: whom will you select as your champions to extort it from him? upon whom will you cast the charge of achieving it against him in the lists?"

* * * * *

In the progress of the war by sea, a great variety of interesting and difficult questions of public law were brought before the Prize Courts for determination. Under the old Confederation,

this branch of the law of nations was administered according to the ordinances published by Congress, recognizing the leading principles of prize law, as practised by the maritime states of Europe. These ordinances, some of which were published even before the declaration of independence, and during the limited hostilities previously authorised, were followed by measures for the establishment of a navy, and a Board of Commissioners for its government, similar to the present Navy Commissioners; and for the appointment of advocates to manage the maritime causes in which the United States might be concerned.

A Court of Appeals was also organized for the express purpose of finally determining causes of this nature; and it is to be lamented, that so few of the decisions of a tribunal, in which some of the most distinguished jurists and patriots of our country presided, should have been preserved or published for the instruction of posterity. The necessary consequence was that the breaking out of the late war found us almost without experience in this branch of law, so far as it depends upon judicial precedents. This defect could be but imperfectly supplied by a resort to the elementary writers on the law of nations, most of whom are extremely deficient in practical details, and a particular application of the general principles they lay down. It therefore became necessary to discuss anew all the leading doctrines

of prize law ; and to confirm them by the authority of the *Suprême Court*.

In laying the foundations of the system which was thus built up, Mr. Pinkney co-operated as an advocate ; and his learning and peculiar experience in this science contributed essentially to enlighten the judgments of the court.

A bill having been brought into the *House of Representatives*, requiring the *Attorney-General* to reside at the seat of government, Mr. Pinkney, who found it incompatible with his other professional engagements to remain constantly there, tendered a resignation of his office to the President. On this occasion he received the following letter from Mr. Madison.

“WASHINGTON, *January 29, 1814.*

“DEAR SIR,—I have received your letter, conveying a resignation of the important office held by you. As the bill to which you refer has not yet passed into a law, I hope you will be able to prolong your functions till a successor can be provided ; and at any rate to afford aid in the business of the United States, particularly understood by you, at the approaching term of the *Supreme Court*.

“On the first knowledge of the bill I was not unaware that the dilemma it imposes might deprive us of your associated services, and the United States of the advantages accruing from your professional care of their interests. I readily acknowledge that in a general view, the object of the bill is not ineligious to

the Executive. At the same time, there may be instances where talents and services of peculiar value outweigh the consideration of constant residence ; and I have felt all the force of this truth since I have had the pleasure of numbering you among the partners of my public trust. In losing that pleasure, I pray you to be assured of my high and continued esteem, and of my sincerest friendship and best wishes."

At the session of the Court in 1815, was brought to a hearing the celebrated case of the *Nereide*, the claim in which had been rejected in the District Court of New-York, and the goods condemned, upon the ground that they were captured on board of an armed enemy's vessel which had resisted the exercise of the right of search. This cause had excited uncommon interest on account of the very great importance and novelty of the questions of public law involved in it, as well as the reputation of the advocates by whom it was discussed.

The claimant, Mr. Pinto, was a native and resident merchant of Buenos Ayres, which had declared its independence of the parent country, although it had not yet been acknowledged as a sovereign state by the government of this country. Being in London in 1813, he had chartered the British armed and commissioned ship in question to carry his goods and other the property of his father and sister to Buenos Ayres, and took passage on board the vessel, which sailed under British convoy, and having been separated from

the convoying squadron, was captured off the island of Madeira, after a short action, by the United States' privateer the Governor Tompkins. The cause was argued by Mr. Emmett and Mr. Hoffman for the claimant, and by Mr. Dallas,* and Mr. Pinkney for the captors.

* Alexander James Dallas was born in the island of Jamaica, on the 21st of June, 1759. He was the son of Robert Charles Dallas, a native of Scotland, and a very eminent physician.

In early youth, Mr. Dallas was taken to England by his father for the purpose of education. He was for sometime at Westminster school, and afterwards became a pupil of Elphinstone, the translator of Dr. Johnson's mottoes to his periodical essays. Mr. Dallas was in the habit of seeing Dr. Johnson at Elphinstone's house, and having on one occasion addressed the author of the Rambler in a complimentary Latin essay, was immediately honoured by the great moralist with the present of a beautiful copy of that work.

In 1780, he married a lady of Devonshire in England; and after a short residence in London with Captain George Anson Byron, (who had shortly before married his sister, and who was the youngest son of Admiral Byron, and the uncle of the celebrated poet Lord Byron,) he embarked for Jamaica to recover his patrimonial inheritance in that island. In this pursuit he was unsuccessful, and left Jamaica for the United States, and arrived at New-York in June, 1783. Determining to remain in this country, he removed to Philadelphia, and took the oath of allegiance to the Commonwealth of Pennsylvania on the 17th of June, 1783.

Mr. Dallas had, while in London, entered his name at the Temple, preparatory to the study of the law. In Jamaica he practised for a short time, and received the commission of a Master of Chancery. His prospects of professional business and public promotion in that island were very flattering, but on his arrival in the United States he determined to unite his fortunes with those of this young republic. He was admitted to

In the course of his argument, Mr. Pinkney insisted that the property ought to be condemned as good prize of war upon the three following grounds :

1. That the treaty of 1795 between the United States and Spain, contained a positive stipulation, adopting the maxim of what has sometimes been called "the modern law of nations," that *free*

the bar of the Supreme Court of Pennsylvania in July, 1785, and to that of the Circuit Court of the United States in April, 1790.

In the political divisions of the country he attached himself to the republican party, and was appointed, in 1791, Secretary of the Commonwealth of Pennsylvania, by Governor Mifflin. In this station he continued until the year 1801, having been successively re-appointed by Governor Mifflin and Governor McKean. In 1801, he was appointed by President Jefferson, the Attorney of the United States for the district of Pennsylvania. During the same year he was commissioned as Recorder of Philadelphia by the State government; and the compatibility of that office with the one he held under the national government, having been drawn in question, by his political opponents, was argued before the Supreme Court of Pennsylvania. The judgment of that tribunal having been pronounced in his favour, he immediately afterwards resigned the office.

Besides the different official situations which he held, he accompanied the Governor of Pennsylvania, as Aid-du-camp, and Paymaster General of the forces, in the expedition to suppress the western insurrection in 1794. On this occasion he conducted with singular diligence and activity, and his services were highly useful to the public cause.

In the early part of his professional career, having much leisure, he occupied himself with various literary undertakings, and prepared for the press the first volume of his valuable series of law reports. In 1795, he completed, with universal approbation, an edition of the laws of Pennsylvania, with notes, in three volumes, folio.

ships shall make free goods; and although it did not expressly mention the converse proposition that *enemy ships should make enemy goods*, yet it did not negative that proposition; and as the two maxims had always been associated together in the practice of nations, the one was to be considered as implying the other.

2. That by the Spanish prize code, neutral

In October, 1814, he was appointed Secretary of the Treasury by President Madison, and acted as Secretary of War from the 22d April, 1815, until the army was re-organized upon the peace establishment. He administered the Treasury department at the most difficult crisis in the affairs of the country which has occurred since the establishment of the present national government; and whatever may be thought of the relative merit of his financial plans in comparison with those suggested by others, the praise of having rescued the national finances from the most perplexing embarrassments, cannot justly be denied him. "In the month of December, 1816, peace being restored, the finances arranged, the embarrassment of the circulating medium daily diminishing, and soon to disappear under the influence of the National Bank, which it had so long been his labour to establish, his property insufficient to defray the expenses of his situation, with a family still dependent on him, he resigned this honourable station, and returned to his practice of the law in Philadelphia. Here he again entered upon professional business with the zeal and ardour of youth. His business was immense, and his talents as an advocate were held in requisition not only at home, but from almost every quarter of the Union. In the midst, however, of prospects more brilliant than he had ever witnessed, and while indulging in the fond belief that a few years of exertion would repair the injury in his private fortunes occasioned by his devotion to the public service—his career was suddenly closed by the inexorable hand of death."

property found on board of enemies' vessels was liable to capture and condemnation, and that this being the law of Spain applied by her when belligerent to us and all other nations when neutral by the principle of reciprocity; the same rule was to be applied to the property of her subject, which Mr. Pinto was to be taken to be, the government of the United States not having at that time ac-

While laboriously engaged in the trial of a cause at Trenton, in New Jersey, he was attacked by a complaint to which he had for a long time been subject, and had barely time to reach his family in Philadelphia, when he died on the 16th of January, 1817.

Mr. Dallas possessed a mind highly gifted by nature, and richly cultivated with a great variety of useful and elegant knowledge. An early and frequent habit of writing had given him an uncommon facility in composition. His style, both in speaking and writing, was chaste and perspicuous: seldom embellished with rhetorical ornament, but always marked by good taste. The various public stations he had filled, his habits of diligent study, and intercourse with the most intelligent persons, had enabled him to acquire an extensive knowledge of mankind and of literature; which he imparted in his colloquial intercourse with peculiar facility and grace. His manners were highly polished, and his amiable disposition endeared him to a large circle of friends, and rendered him an ornament to the elegant society in which he moved. As an advocate, he was distinguished for his patient industry—his accurate learning—and his diffusive and minute investigation of the subjects he undertook to discuss. When called to a seat in the national cabinet, besides his accustomed diligence, activity, and method in business, he displayed an energy of character not generally looked for, and showed that he possessed the bold and comprehensive views of a patriotic and enlightened statesman.

knowledgeed the independence of the Spanish American colonies.

3. He contended that the claim of Mr. Pinto ought to be rejected on account of his unneutral conduct in hiring, and putting his goods on board of, an armed enemy's vessel, which sailed under convoy, and actually resisted search.

But on this last head, I have thought it fit to let Mr. Pinkney speak for himself, as the discussion involved an interesting principle of international law, and his manner of treating it will give the reader some notion of his forensic style and peculiar mode of reasoning upon legal subjects. For this purpose I have inserted this portion of his argument, together with the exordium and peroration of his speech in this cause.* It is well known that Mr. Pinkney's argument was overruled by the court, and the sentence of condemnation reversed by the opinions of a majority of the judges of the Supreme Court. It is remarkable, however, that it should have been determined by Sir William Scott, a short time before the hearing in the *Nereide*, (although the judgment was not known in this country,) that British captors were entitled to salvage, for the recapture of neutral (Portuguese) property, taken by one of our cruizers on board our *armed* British ship, upon the ground that the goods would have been liable to

* See PART SECOND, No. IV. The Editor very much regrets that it has not been in his power to procure a full note of the very able and eloquent argument of Mr. Emmet in this cause.

condemnation in our courts of prize according to the established principles of the law of nations.*

But the Supreme Court did not so understand that law, nor did they consider the case of Mr. Pinto such as it had been represented in the argument of Mr. Pinkney, and the glowing, metaphorical language by which it was sought to be illustrated.

In the words of Mr. Chief Justice Marshall, in delivering the judgment of the Court, "the Ne-
"reide was armed, governed, and conducted by
"belligerents. With her force, or her conduct,
"the neutral shippers had no concern; they de-
"posited their goods on board the vessel, and
"stipulated for their direct transportation to
"Buenna Ayres. It is true, that on her passage,
"she had a right to defend herself, and might
"have captured an assailing vessel; but to
"search for the enemy would have been a viola-
"tion of the charter party and of her duty.

"With a pencil dipped in the most vivid co-
"lours, and guided by the hand of a master, a
"splendid portrait has been drawn, exhibiting
"this vessel and her freighter as forming a single
"figure, composed of the most discordant mate-
"rials of Peace and War. So exquisite was the
"skill of the artist, so dazzling the garb in which
"the figure was presented, that it required the
"exercise of that cold investigating faculty which

* Dodson's Admiralty Reports, vol. L, p. 443.

“ ought always to belong to those who sit on this
 “ bench, to discover its only imperfection,—its
 “ want of resemblance.

“ The Nereide has not that centaur-like ap-
 “ pearance which has been ascribed to her. She
 “ does not rove over the ocean, hurling the thun-
 “ ders of war, while sheltered by the olive branch
 “ of peace. She is not composed in part of the
 “ neutral character of Mr. Pinto, and in part of
 “ the hostile character of her owner. She is an
 “ open and declared belligerent ; claiming all the
 “ rights, and subject to all the dangers, of the bel-
 “ ligerent character. She conveys neutral pro-
 “ perty which does not engage in her warlike
 “ equipments, or in any employment she may
 “ make of them ; which is put on board solely
 “ for the purpose of transportation, and which
 “ encounters the hazard incident to its situation ;
 “ the hazard of being taken into port, and obliged
 “ to seek another conveyance, should its carrier
 “ be captured.

“ In this, it is the opinion of the majority of the
 “ Court there is nothing unlawful. The charac-
 “ ters of the vessel and the cargo remain as dis-
 “ tinct in this as in any other case.”*

Soon after the conclusion of the peace with
 Great Britain, the citizens of Baltimore, where

* Cranch's Reports, vol. ix. p. 436.

Mr. Pinkney still continued to reside, held a public meeting, at which the following Address, drawn up by him, was adopted and directed to be transmitted to Mr. Madison. This paper may be considered as embodying the opinions and feelings of Mr. Pinkney upon the great struggle through which the country had just past; opinions and feelings which he had frequently expressed in popular essays, and speeches to public meetings, and which he never withheld from his fellow-citizens in public or in private. He had been an eye-witness of the unceasing anxiety of our government to avoid a resort to war, and of the spirit in which their forbearance was met by the opposite party. He had exposed his own life in the defence of his country. He was, therefore, peculiarly qualified to give utterance to the sentiments of a people, who had manifested an unshaken attachment to the public cause; who had never wavered in their fidelity to the government and the country; and who had repelled with courage and constancy the attacks of an enterprizing enemy flushed with his recent success against the capital of the nation.

"To the President of the United States.

"We beg leave to offer to you our sincere congratulations upon the conclusion of an honourable peace between the United States and Great Britain, and at the same time to express our unfeigned admiration of the enlightened wisdom, and patriotic firmness, by which your conduct has been distinguished during the extraordinary trials to which for some time past our country has been exposed by foreign injustice.

“ In the anxious and long-continued efforts of our government to avoid a contest with England, we have seen and approved that spirit of moderation and love of peace, which ought in a peculiar manner to characterise republican rulers ; and in the decision with which an appeal to arms was made, when forbearance was no longer possible, we recognize and applaud that courageous devotion to the rights and honour of the nation, which a brave people are entitled to expect from those who are the depositories of their power.

“ The struggle which followed that appeal was necessarily commenced under formidable difficulties, growing out of our own situation and that of the enemy ; but it was marked in its progress by signal triumphs, won by a navy in the weakness of its infancy, from the greatest maritime nation on the globe, and by an army and militia in which discipline had only begun to lend its aid to valour, from those who had long been formed to military habits, and had become familiar with victory over the veteran troops of France.

“ That struggle has revived, with added lustre, the renown which brightened the morning of our independence. It has called forth and organized the dormant resources of the empire : it has tried and vindicated our republican constitution : it has given us that moral strength which consists in the well-earned respect of the world, and in a just respect for ourselves. It has raised up and consolidated a national character, dear to the hearts of the people, as an object of honest pride and a pledge of future union, tranquillity, and greatness. It has not, indeed, been unaccompanied by occasional reverses ; yet even these have had their value and may still be wholesome to us, if we receive them as the warnings of a protecting Providence against the errors of a false confidence, and against intemperate exultation in the midst of more prosperous fortune. Many of our citizens, too, have fallen in this conflict, and it becomes us to mourn their loss ; but they have fallen that their country might rise ; they have cemented with their blood the fabric of her happiness and glory ; and although death has snatched them from us, they will still live in their example and in the grateful remembrance of their countrymen.

“ Throughout this severe probation your course has been steady and uniform, you have not been turned aside from the pursuit of peace, through a vigorous preparation for war, by unforeseen and gigantic embarrassments, enhanced if not produced by an opposition more active and persevering than ever before was known to palsy the energies of a free state, in the hour of her greatest peril. The result of constancy, sustained and animated by virtue, has been what it ought to be : the result has been a peace which every American feels that he may enjoy, not only without a blush, but with a lofty consciousness that it brings with it augmented honour for the present, and security for the future.”

I have mentioned that Mr. Pinkney was actively engaged in the defence of the country during the war. Soon after it was declared he was elected to command a volunteer corps which had been raised in Baltimore for local defence, and which was attached as a battalion of riflemen to the third brigade of Maryland militia. He marched with his corps to Bladensburg, at the time of the attack on the city of Washington by the British under General Ross, and conducted with great gallantry in the action at the former place, where he was severely wounded. Some time after the peace, he resigned his command, on which occasion the following communications passed between him and his fellow-soldiers.

“ To the Battalion of Riflemen, attached to the 3d Brigade of Maryland Militia.

“ It has become necessary, fellow-citizens, that I should resign my commission as your Major ; and I am about to resign it accordingly. I accepted it, as you know, during the late war with

England, in the hope that it would enable me to be in some degree useful in the defence of our country. In the event, my usefulness has been very small; but the knowledge that yours was great and signal has consoled me; it has more than consoled me; it has filled me with an honest pride.

"Your bravery, and skill, and conduct, have won for you a high name, that ought to be dear to you as a corps. It will, I trust, be as a bond of union, and keep you together under a better commander than I can pretend to be. You cannot have a commander more truly attached to you personally, and to your honour as soldiers, than I have always been; but certainly you may have one with more activity, more leisure, more knowledge of your peculiar discipline.

"If the war had continued, I would not have parted from you; but peace has taken away the only motive which could justify me, at my age, and in my situation, in holding a military commission.

"I take my leave of you, therefore, under a persuasion that propriety demands it. I need not tell you that I do so with regret, produced by a remembrance of our past connexion; nor is it necessary that I should assure you that in ceasing to be your commanding officer, I shall not cease to be your friend.

"WM. PINKNEY.

"BALTIMORE, Sept. 22, 1815."

"BALTIMORE, Oct. 11, 1815.

"Major WM. PINKNEY:

"SIR,—The Battalion of Riflemen attached to the Third Brigade Maryland Militia, have received, with emotions of deep regret, the information that you have resigned that command, the duties of which, during a most arduous period, you discharged with so much honour to yourself, advantage to the corps, and to your country.

"As long as our government cherished the pleasing hope that the force of justice, reason, or argument, could induce a powerful nation to cease from violating our neutral rights, harassing our lawful commerce, and dragging our seamen into ignominious bondage, your splendid talents and matchless eloquence were em-

ployed in the attempt ; commanding the respect of your opponents and the applause of your admiring country. But, when our government was at length tardily convinced that the hope it had so long cherished was indeed fallacious, and reluctantly determined, in compliance with the wishes of the nation, to appeal to arms, your fellow-citizens beheld you among the foremost to second that appeal, and unsheathe your sword to assert the violated rights, and avenge the insulted honour, of our beloved country ; your talents were there directed to improve that discipline, increase that devotion, and exalt that courage, which were eventually so successfully employed in bringing the war to a speedy and an honourable termination.

“ If, in the course of the glorious contest, this corps has acquired any claim to the applause of its country, we do not hesitate to ascribe it, in a great degree, to the influence of your example, which pervaded its ranks, and invigorated its exertions, in the day of battle. To be separated from an officer whose talents, courage, and patriotism, are universally admired, and whose blood has been freely shed in defence of that cause, the justice of which his eloquence had, on many occasions, so abundantly established, must be at any time a subject of regret ; but we console ourselves with the reflection, that under existing circumstances, the portion of your valuable time, which would have been occupied by the duties of the command you have resigned, may be more beneficially employed in discharging the important duties of that honourable station in the councils of the republic, to which you have been called by the gratitude and confidence of your fellow-citizens.”

The station in the public councils to which Mr. Pinkney had been called in the manner stated in the above Answer, was that of a Representative in Congress from the city of Baltimore. Soon after

his election, a question arose of very great importance under our peculiar political system, which was discussed with much zeal and talent in the two houses of the national legislature. A commercial convention between the United States and Great Britain was signed at London in July, 1815, and subsequently ratified by the President and Senate, by which it was stipulated that the discriminating duties on British vessels and their cargoes, then subsisting under certain acts of Congress, should be abolished, in return for a reciprocal stipulation on the part of Great Britain. On this occasion a bill was brought into the House of Representatives to carry the convention into effect, specifically enacting the stipulations contained in the convention itself. This bill was opposed by Mr. Pinkney in a speech containing a full discussion of the whole subject, both as connected with the law of nations and our own municipal constitution.*

In order to explain this speech, it may not be ~~useless~~ to mention that the bill passed the House of Representatives, but was rejected in the Senate; that body having passed a mere declaratory bill enacting that so much of any act of Congress as was contrary to the stipulations of the convention, should be deemed and taken to be of no force or effect. Some further proceedings took place; and the disagreeing votes of the two

* See Part II No. V.

houses were at last reconciled by a committee of conference, at whose recommendation the declaratory bill was passed by the House of Representatives, and became a law.

It may also be expedient to remind the reader of what took place in the House of Representatives under the administration of General Washington, as to the legislative provisions necessary to carry the British treaty of 1794 into effect. In the debate on this subject, it was contended that the constitution having provided that all treaties made under the authority of the United States should be the supreme law of the land; every treaty being a contract between the nations who are parties to it; and the treaty with Great Britain having been ratified by the President with the advice and consent of the Senate, a refusal by the House of Representatives to provide the means of carrying it into effect, was consequently a violation of the treaty, and a breach of the national faith. On the other hand, it was insisted that a treaty which required an appropriation of money, or any other special legislative provision to carry it into effect, was not, so far, of binding obligation, until Congress had adopted the measures necessary for that purpose. The House of Representatives ultimately passed a resolution, calling on the President to lay before them the instructions to Mr. Jay, the minister by whom the treaty had been negociated, and the correspondence and other papers, except so far as they were improper to be disclosed on account of pending negocia-

tions. President Washington declined complying with this request ; stating that a treaty, when duly made by the President and Senate, became the supreme law of the land ; that the assent of the House of Representatives was not necessary to its validity ; and therefore the papers requested could not properly be required for the use of the House, unless for the purpose of impeachment, which was not stated to be the object of the call. The House thereupon passed resolutions disclaiming the power to interfere in the making of treaties, but asserting its right, whenever stipulations were made on subjects within the legislative province of Congress, to deliberate and decide as to the expediency of carrying them into effect.*

* At the session of the Court, 1816, Mr. Pinkney still continued his labours at the national bar, where he frequently came in conflict with the great abilities of Samuel Dexter.

Mr. Dexter, who died soon after this term, may be pronounced one of the ablest men this country has produced. The manner in which he combined the various talents and attainments of the common lawyer, the civilian, and the statesman, may be appealed to as a striking example of those expansive views and liberal studies which distinguish the more eminent advocates at the American bar.

He was born at Boston in the year 1761, and was the second son of Samuel Dexter, an eminent merchant of that city. His father was a man of acute understanding, and an ardent lover of his country. In those struggles between the provincial legislature of Massachusetts and the royal governors, which preceded and prepared the revolution, he bore a prominent part. He was repeatedly negatived by the Governor as a counsellor, until so

In March, 1816, Mr. Pinkney was again called into the diplomatic service of his country. In order to understand the motives which had repeatedly induced him to go abroad in the same service, it is necessary to advert to some of the peculiar circumstances connected with his brilliant success at the bar. This success was as much the effect of extraordinary diligence and labour as of his

constantly was he re-elected, that it was not thought prudent to persist in rejecting him. In 1774, he had the signal honour of being negatived by Governor Gage, in company with Bowdoin and Winthrop, by the "express commands of his Majesty." The pen of this eminent patriot is to be traced in the answers to the Governor's speeches, and the various state papers of the day ; which have so long been the theme of general admiration for their manly style, their perspicuous argument, and their firm and bold tone of remonstrance against the oppressive measures of the British government. He lived to see his country free and happy ; and the evening of his days was spent in studies connected with the noblest speculations in which the human mind can be engaged. These studies, begun and continued for his own private satisfaction, resulted in the establishment of a professorship of Sacred Literature in the University at Cambridge, which was founded by his testament.

His son was graduated at this university in 1781. With such a paternal example, the path of public and private virtue was open before him. After being admitted to the bar, he rose rapidly to eminence in his profession, and in the public councils of his native State. He was soon elected to Congress ; at first as a member of the House of Representatives, and afterwards as a member of the Senate. He distinguished himself as an able debater, at a period when both houses of the national legislature were adorned with the presence of many eloquent statesmen ;

genius and rare endowments of mind. His continued application to study, writing, and public speaking, which a physical constitution as powerful as his intellectual enabled him to keep up with a singular perseverance, was one of the most remarkable features of his character. He was never satisfied with investigating his causes, and took infinite pains in exploring their facts and

and was successively appointed Secretary of War, and of the Treasury, under the administration of President Adams. On the change of administration, in 1801, he resigned his official station, and resumed the practice of his profession; but he never remained a silent or indifferent spectator of the dissensions and dangers of his country. "The prerogative of the mind of Mr. Dexter was a right to think for itself;" and on the declaration of war with Great Britain in 1812, he separated from the political connexion with which he had hitherto acted.

He took a zealous part in promoting the interests of learning, and devoted his leisure to the same studies which had engrossed so much of the attention of his father. He was deeply grounded in the doctrines of Christianity, and the testimonies upon which their credibility is rested. They habitually guided his conduct in life, and he strengthened their influence by private meditation in that retirement which was so congenial to his disposition.*

The features of the intellectual character of Mr. Dexter presented a strong contrast with those of Mr. Pinkney. He had cultivated his powers by silent meditation and reflection, rather than by the study of books. Without being at all deficient in mere technical learning, he relied mainly upon his own distinguishing faculties, and in his legal investigations sought for those

* The above account is principally compiled from a notice which appeared in one of the Boston newspapers soon after Mr. Dexter's decease.

circumstances, and all the technical learning connected with them. He constantly continued the practice of private declamation as a useful exercise, and was in the habit of premeditating his pleadings at the bar, and his other public speeches,—not only as to the general order or method to be observed in treating his subject, the authorities to be relied on, and the leading topics

original principles which lie at the foundation of every civilized code. His forensic style was marked by a strong metaphysical logic, combined with great purity and simplicity of diction; and he unfolded the most perplexed and intricate questions of public and private law with a power of analysis which seemed almost intuitive. In the course of his investigations he frequently arrived at the same conclusions with those who pursued the more laborious process of reasoning, merely from analogy and precedents; and often found himself sustained by the authority of a Scott or a Mansfield, when he was not aware that he was treading in the footsteps of those great jurists. At other times he confirmed and strengthened the authority of the oracles of the law by new inductions and fresh illustrations drawn from his own capacious intellect. Less attentive to the forms and analogies of technical law, than to the principles of natural equity, his mind was enlarged by a philosophical view of universal jurisprudence; and to him might be applied what Cicero says of Sulpicius:—"Neque ille magis jurisconsultus quam justitiæ fuit: ita ea quæ proficisebantur a Legibus et a Jure civili semper ad Facilitatem Equitatemque referrebat." But it is higher praise and equally well merited, that in him the character of the advocate seemed to borrow a new lustre from that of the philosopher and the patriot; that like the illustrious Roman referred to,—“in his political conduct he was always the friend of peace and liberty; moderating the violence of opposite parties, and discouraging every step towards civil dissensions.”

of illustration, but frequently as to the principal passages and rhetorical embellishments. These last he sometimes wrote out beforehand; not that he was deficient in facility or fluency, but in order to preserve the command of a correct and elegant diction. All those who have heard him address a jury, or a deliberative assembly, know that he was a consummate master of the arts of extemporaneous debating. But he believed, with the most celebrated and successful orators of antiquity, that the habit of written composition is necessary to acquire and preserve a style at once correct and graceful in public speaking; which without this aid is apt to degenerate into colloquial negligence, and to become enfeebled by tedious verbosity.* His law papers were drawn

* A writer in the *Edinburgh Review*, referring to this practice of the ancients, quotes the following passage from Mr. Brougham's Inaugural Discourse, on his election as Lord Rector of the University of Glasgow. "I should lay it down as a rule admitting of no exception that a man will speak well in proportion as he has written much; and that with equal talents, *he* will be the finest extempore speaker when no time for preparing is allowed, who has prepared himself the most sedulously when he had an opportunity of delivering a premeditated speech. All the exceptions, I have ever heard cited to this principle, are apparent ones only," &c. The reviewer then proceeds to mention some examples of this practice. "Pericles, we learn,—Pericles, of whose astonishing powers an attempt has been made to convey an adequate idea by affirming of him that he thundered, and lightened, and shook all Greece,—a man of business, too, (as Mr. Hume justly observes of him, if ever there was one,) prepared himself by written composition, and first introduced the practice—*πρὸς τὸν λαόν τιμιον λόγον ἐν δικαστηρίῳ ἔπει, τοὺς πρὸ αὐτοῦ σχεδία-*

up with great care ; and his written opinions were elaborately composed both as to matter and style ; and frequently exhausted, by a full discussion, the subject submitted for his consideration. If to all these circumstances, be added the fact that he

ἐκτρέφει. And this it will be remembered was done at Athens, where the people were, according to Demosthenes, the readiest, the quickest, and the most expert at extempore composition. It by no means follows, that a person of experience and study, if prepared with regular and set passages, (Lord Erskine, we believe, had written down, word for word, the passage about the Savage and his bundle of sticks, in his speech on Stockdale's trial,) is, when those passages are ended, like a swimmer who goes to the bottom the very moment he loses his corks. *Nabit sine cortice !* The mind, having acquired a certain excitement and elevation, and received an impetus from the tone and quality of the matured and premeditated composition, perseveres in the same course, and retains that impetus after the impelling cause shall have died away."

Mr. Moore, in his interesting life of Sheridan, remarks, as one of the striking characteristics of that extraordinary person, the great degree of labour and preparation which his productions, both as an orator and a writer, cost him. "He never made a speech of any moment, of which the sketch, more or less detailed, has not been found among his papers—with the showier passages generally written two or three times over (often without any material change in their form) upon small detached pieces of paper, or on cards. To such minutiae of effect did he attend, that I have found, in more than one instance, a memorandum made of the precise place in which the words ' Good God, Mr. Speaker,' were to be introduced. These preparatory sketches are continued down to his latest displays ; and it is observable that when from the increased derangement of his affairs, he had no longer leisure or collectedness enough to prepare, he ceased to speak."

engaged in the performance of his professional duties with unusual zeal, always regarding his own reputation as at stake, as well as the rights and interests of his client,—and sensibly alive to every thing which might affect either, and that he spoke with great ardour and vehemence ; it must be evident that the most robust constitution would not be sufficient to sustain such intense and unintermitted labour, where every exertion was a contest for victory, and each new success a fresh stimulus to ambition. He, therefore, found it necessary to vary his occupations, and to retire altogether from the bar for a season, in order to refresh his wearied body and mind, with the purpose of again returning to it, with an alacrity invigorated and quickened by this temporary suspension of his professional pursuits. He was thus induced to accept the appointment of Minister Plenipotentiary to the court of Russia, and of special Minister to that of Naples. Soon after this double mission had been conferred upon him, in a conversation with one of his friends, he said : “ There are those among my friends who wonder that I will go abroad, however honourable the service. They know not how I toil at the bar ; they know not all my anxious days and sleepless nights ; I must breathe awhile ; the bow forever bent will break : ” “ Besides,” he added, “ I want to see Italy : the orators of Britain I have heard, but I want to visit that classic land, the study of whose poetry and eloquence is the charm of my

life ; I shall set my foot on its shores with feelings that I cannot describe, and return with new enthusiasm, I hope new advantages, to the habits of public speaking."

On this occasion he published the following Address to his constituents :

"FELLOW-CITIZENS—My acceptance of an appointment as the Minister Plenipotentiary of the United States to Russia, makes it necessary that I should resign my seat as one of your Representatives in Congress. I am conscious that I owe you an apology for having attempted to hold it even for a single day, rather than for this tardy resignation of it ; and I assure you if I had acted upon my own judgment, instead of the suggestions of friends, who hoped that I should find leisure to be of some use to you, I should long since have given you an opportunity of selecting a better representative in my place. I was persuaded before the present session commenced, that the duties of my profession, which a long course of public employment had rendered indispensable to my family, would press so urgently upon me as to compel me to seem careless of your interests. The event has verified that persuasion. During the greater part of this session I have been incessantly occupied in courts of justice, and have been scarcely able to give such attendance in the House of Representatives as would allow me to vote upon the most important questions. To mix much in the discussion of those questions, greatly as I desired to do so, was impracticable. If I had remained at the bar, therefore, I should have thought it incumbent upon me, after such an experiment, to ask your permission to retire from the post in which your partiality had stationed me ; convinced that it would be impossible for me to do justice in it either to you or myself, without the utter neglect of what I owe to those who depend upon me for support.

"I beg you, fellow-citizens, to believe that I have not willingly been an inattentive servant, and that, as I was proud of the high distinction which you had conferred upon me, I should have merited it by a close application to your concerns, if I had been at

liberty to do so. I feel assured that I may rely upon your known liberality for my justification in this respect ; and, while I offer you my grateful thanks for the proof of confidence with which you have honoured me, and that too in a season of danger and trial, which has now passed away, I pray you to be convinced that you will always find in me a faithful friend, devoted to your honour and prosperity, in whatever situation I may happen to be placed.

WM. PINKNEY."

Mr. Pinkney embarked, for the purpose of proceeding on his foreign missions, on board the *Washington*, a ship of the line, composing a part of our Mediterranean squadron, under the command of Commodore Chauncey, and landed at Naples on the 26th of July, 1816. The object of his mission to the Neapolitan court was to demand from the present government of Naples indemnity for the losses which our merchants had sustained by the seizure and confiscation of their property in 1809, during the reign of Murat. After he had fulfilled the duties of this special mission, he was to proceed to St. Petersburg as the minister resident of the United States.

On his arrival at Naples he immediately applied himself to the business with which he was charged, and after various conferences with the Marquis di Circello, the Minister of Foreign Affairs, he addressed a note to that minister, containing an elaborate argument upon the responsibility of a nation for wrongs done and obligations

incurred under its actual rulers, upon a subsequent revolution in the government which may stamp those rulers with the character of usurpers in the view of their successors.*

The Neapolitan minister evaded giving any answer to this note, until after Mr. Pinkney's departure from Naples, which he was obliged, by his instructions, to leave, in order to repair to his post at St. Petersburg; and, as is well known, the Neapolitan government refused to admit the justice of the demand which he was directed to present for its consideration.

During Mr. Pinkney's stay at Naples he received information from Mr. Harris, our Chargé d'Affaires at St. Petersburg, that the Emperor of Russia having taken offence at the conduct of the United States' government in the affair of Mr. Kosloff, the Russian Consul-General in this country, had forbidden Mr. Harris from appearing at court. Kosloff had been arrested, upon the accusation of having committed a horrible crime; and was indicted for the offence in the State Court of Pennsylvania. A motion was made by the prisoner's counsel to quash the indictment for want of jurisdiction in the Court, upon two grounds: 1st. That consuls are privileged by the law of nations from criminal prosecutions in the tribunals of the country where they reside. 2dly. That by

* State Papers, vol. xi. p. 487.

the constitution of the United States exclusive jurisdiction in all cases affecting ambassadors, other public ministers, and consuls, is conferred upon the Courts of the Union. The first point was determined in the negative; but it was held, that although foreign consuls are amenable to the criminal justice of the country where they reside, yet the national constitution has conferred upon the Courts of the United States *exclusive* jurisdiction of all offences committed by them in this country. But the State Court did not undertake to determine by what law he was to be tried in the Courts of the Union; and he was afterwards discharged without a trial, upon the doubts which I have before stated to exist among our jurists, whether the Courts of the United States have power to try and punish offences committed by a person, over whom they have, by the constitution, jurisdiction in all cases; but where there is no express act of Congress defining the offence and affixing the punishment: or, as it has commonly been expressed, whether the national Courts have any common law jurisdiction.

Mr. Pinkney deemed this matter of sufficient importance, in respect to the propriety of his presenting himself as the minister of the United States at the Russian court, so long as the difficulty subsisted, to induce him to send forward Colonel King, the Secretary of his Legation, with the following letter to Mr. Harris :

" *Private.*

" *NAPLES, September 17, 1816.*

" *SIR,*—I received last night your letter of the 30th of July, with its enclosure. The light in which the Emperor has seen the affair of Mr. Kosloff is very much to be regretted ; but I have *no orders* to offer any explanations upon it, although the means of explanation have been put into my hands by the Department of State. I am in possession of copies of all the material papers belonging to the case ; and consequently know and am able to say with perfect confidence, that the government of the United States had not, either in fact or constructively, any participation in the act of which the Emperor seems particularly to complain. I am not, however, authorized to make a formal disavowal of that act, because (as I presume) it had not occurred to the government that it could be necessary, or would be desired.

" It is impossible to understand this affair ever so slightly without perceiving that it was *altogether* a judicial proceeding, in the common course, by a magistrate, and by officers of the *State of Pennsylvania*, over whom the government of the Union could exert no preventive control, (even if it had divined their intention to arrest and imprison Mr. Kosloff,) and against whom it could institute no prosecution, after the act was done, with a view to their punishment. It is plain *upon the face of the transaction* that the government of the United States has given no cause of offence to Russia, either by what it omitted to do, or by what it did. In truth, it omitted nothing which it could, and ought to have done ; and, in all that it did, manifested the utmost possible respect to the Emperor. It endeavoured, through its law officer (the District Attorney for Pennsylvania) to put an end to the prosecution, by placing Mr. Kosloff, as Russian Consul-General, under the peculiar protection, either of the law of nations, or of the constitution of the United States ; and the prosecution *was* terminated by a decision of the Court of Pennsylvania, that, although a consul is not entitled (as undoubtedly he is not) to the immunities which appertain by the *jus gentium* to ministers, he is nevertheless not amenable in America to a *State tribunal*. The government could go no farther ; and this

was the whole of its connexion with Mr. Kosloff's case, with the exception only of its refusal afterwards to issue an order, upon Mr. Daschkoff's application, for the trial of Mr. Kosloff in *a tribunal of the United States*; the Attorney-General having reported that according to a recent adjudication of the Supreme Court, such a trial could not be had.

"When I left America, I do not believe any body supposed that the Emperor had taken, or would take, umbrage, at Mr. Kosloff's affair. In my instructions, therefore, (which breathe nothing but esteem and reverence for the Emperor,) it is not even mentioned. Yet I am sure that if the American government had anticipated the feeling which it has excited in the Emperor, it would have hastened to prevent it by such explanations as could not have failed to be satisfactory. The disposition of the government of the United States to cultivate the most amicable relations with his Imperial Majesty is known to all the world; and if it has not been forward to explain the case of Mr. Kosloff before explanation was required, it could only be because the consciousness of its sentiments, of respect and kindness stood in the way of even a conjecture that they would be brought into question.

"I take for granted, however, that as Mr. Daschkoff was directed to ask reparation, the misunderstanding has long since been removed, notwithstanding the strong step adopted by the Emperor *in limine*, of forbidding the appearance at court of the Chargé d'Affaires of the United States. It is not improbable that I shall receive in a few days (by a despatch vessel expected by Commodore Chauncey) some communication from the Department of State on this matter; and I can scarcely doubt that you have already received instructions concerning it. At any rate, I persuade myself that nothing serious can ultimately grow out of *such* a difficulty. But still it would be improper that I should present myself before the Emperor as the minister of my country, until I know with certainty that the difficulty has wholly ceased, or until I have such further instructions as will enable me to remove it, or will make it my duty to encounter it. While you are desired to absent yourself from court, it would be rash in me to hope, (at least until I have power to do what it seems

is indispensable, i. e. to disavow *by the express command of my government*, the conduct of the magistrate, &c.) to be received with the respect which is due to those whom I have the honour to represent. Upon a point so delicate, I will not unnecessarily put any thing to hazard.

"I have, therefore, determined to send to you immediately, with this letter and all the papers above alluded to, Colonel King, (the secretary of my legation here and in Russia,) and to follow myself as far as Berlin, as soon as my business here is finished. My mission to this court will be brought to a close within the next fortnight; and I shall then lose no time in proceeding towards St. Petersburg until I reach Berlin, where I shall wait to hear from you, unless I hear from you sooner, as I hope I shall. Colonel King, who knows perfectly my views, will supply verbally what may be deficient in this letter."

The following is an extract of a letter from Mr. Pinkney to Mr. Monroe, dated October 7th, 1816.

"I am at last on the point of quitting Naples. I have heard nothing further from Mr. Harris, and Mr. King has not written to me since he left us; but I shall go on towards St. Petersburg as rapidly as I can, in the confidence that the affair of Kosloff has been settled. My health has suffered here. The climate looks well enough, (not better however than our own,) but it relaxes and enfeebles much more than ours. The so much vaunted sky of Italy appears to me (thus far) to be infinitely inferior to that of Maryland. Every thing here has been overrated by travellers, except the Bay of Naples, and the number and clamorous importunity of the common beggars, and the meanness of the beggars of a higher order, which it is absolutely impossible to overrate. After all, our country gains upon our affection in proportion as we have opportunities of comparing it with others.

"About this time, the American people, as I trust, are employed in preparing to offer you the only recompense in their power (a flattering one it is to any man) for your long and faithful services. I feel confident that before this reaches you it will

be known that your fellow-citizens think you entitled, by a life of unsullied honour and enlightened patriotism, to be preferred to all others as their chief magistrate. It will depend upon that whether I continue in public life or not. My wish at any rate (I think I shall not change it) is not to remain long at St. Petersburg. The station in London is full; and likely to be so, and my desire of course will be (as I now believe) to return to America about the time I mentioned to you, that is, after a lapse of two years from the epoch of my departure from it. The probability is, that in that event, I shall station myself permanently at Washington, and that I shall there resume my professional pursuits." * * *

Mr. Pinkney soon afterwards proceeded through Rome, and the other principal Italian cities, to Vienna, and finding the obstacle alluded to in the above letters removed, continued his journey to St. Petersburg, where he remained about two years.

In a letter to his daughter, Mrs. Cumberland D. Williams, dated the 16th of August, 1817, he speaks of his health, and that of his family being affected by the climate, but that every body had been so kind to them that they almost forgot that the climate did not suit them. He mentions that he had requested his recall, and hoped before long to return home, to leave the United States no more. In the same letter, he gives the following sketches of some of the members of the Imperial family.

* * * * *

"The Empress Mother is still a charming woman, and when young must have been extremely handsome. She may be said to do the honours of this splendid court; and it is fit that she should. Her manners are infinitely pleasing, at the same time that they

are lofty ; and she is a perfect mistress of the arts of conversation. She is, moreover, exemplary in all the relations of life, and is beloved for her goodness by all classes.

“Of the reigning Empress it is impossible to speak in adequate terms of praise. It is necessary to see her to be able to comprehend how wonderfully interesting she is. It is no exaggeration to say, that with a slight abatement for the effects of time and severe affliction, (produced by the loss of her children,) she combines every charm that contributes to female loveliness, with all the qualities that peculiarly become her exalted station. Her figure, although thin, is exquisitely fine. Her countenance is a subduing picture of feeling and intelligence. Her voice is of that soft and happy tone that goes directly to the heart, and awakens every sentiment which a virtuous woman can be ambitious to excite. Her manner cannot be described or imagined. It is graceful, unaffectedly gentle, winning, and at the same time truly dignified. Her conversation is suited to this noble exterior. Adapted with nice discrimination to those to whom it is addressed, unostentatious and easy, sensible and kind, it captivates invariably the wise and good, and (what is yet more difficult) satisfies the frivolous without the slightest approach to frivolity. If universal report may be credited, there is no virtue for which this incomparable woman is not distinguished : and I have reason to be confident from all that I have observed and heard, that her understanding (naturally of the highest order) has been embellished and informed to an uncommon degree by judicious, and regular, and various study. It is not, therefore, surprising that she is alike adored by the inhabitant of the palace and the cottage, and that every Russian looks up to her as to a superior being. She is, indeed, a superior being, and would be adored, although she were not surrounded by imperial pomp and power.”

* * * * *

The following extract of a letter from a friend of the Editor, who was much in Mr. Pinkney's society at St. Petersburg, will explain his manner of life and the nature of his pursuits while

in that capital, as well as the estimate formed of his talents and the extent of his attainments by a very intelligent observer.

"I arrived in St. Petersburg in the month of June, 1817. I carried a letter of introduction to Mr. Pinkney from our friend, Mr. Justice Story. Mr. P. received me at once with the greatest kindness and hospitality. He told me almost the first time I saw him, that he should not make a single dinner for me, or receive me with ceremony; but if I would consider myself a member of his family, and take a seat at his table constantly, when not otherwise engaged, he should be gratified. As I soon found he was in earnest, I accepted his offer almost to its full extent. I passed about two months in the city, lodging at the same hotel with him, and domesticated with his family. I saw him every day, and at almost every meal; and the recollections I have of the pleasure enjoyed in his society, are amongst those I shall longest retain.

"Of his past life, he did not speak much. I inferred, however, that he had always been a hard student, and considered himself a laborious and thorough scholar in those branches of human knowledge to which he had more particularly devoted himself. I remember that he once said to me, that he considered the late Mr. Chief Justice Parsons and himself the only men in America who had thoroughly studied and understood Coke Littleton. He appeared to estimate the legal acquirements of our professional men as of little extent, generally speaking, and to think he gave himself but little credit in thinking that he had learnt more law than any other man in the country.

"He kept himself very much in private, living so (as he said) from motives of economy. He was in lodgings at the Hotel de l'Europe, and saw no company ceremoniously—that is, he gave no dinners, &c. He had made it known to the diplomatic circle there when he first arrived, that he should live in that style, and therefore could not reciprocate their civilities. They, however, visited him a good deal, and he accepted their invitations frequently. I understood from various quarters, and inferred from what I saw, that he stood very particularly well with the

Emperor, his family, and principal ministers. His personal habits were very peculiar. His neatness, and attention to the fashionable costume of the day, were carried to an extreme, which exposed him while at home to the charge of soppery and affectation. But it should be remembered how large a portion of his life he had spent abroad, and in the highest circles of European society. Though he undoubtedly piqued himself upon being a finished and elegant gentleman, yet his manners and habits of dress were, as it always seemed to me, acquired in Europe; and so far from being remarkable there, they were in exact accordance with the common and established usages of men of his rank and station. All who have been at any of the European courts know that their statesmen and ministers consider it a necessary part of their character to pay great attention to the elegancies and refinements of life,—and after a day passed in the laborious discharge of their duties, will spend their evenings in society, and contribute quite their share of pleasant trifling. It is their *manière d'être*.

During the summer that I passed with Mr. Pinkney, his personal habits were very regular. He breakfasted late, and heartily. Then he retired to his study, and we saw him no more until dinner at six o'clock. The evening he passed with his family, or in visiting. He took very little exercise, eat and drank freely, and I thought suffered occasionally from the usual effects of a plethoric habit, with much indulgence as to food, and no attention to exercise. Undoubtedly his extreme attention to personal cleanliness contributed much to preserve his health. His family saw little company at home or abroad; he appeared to be extremely fond of them, and satisfied with passing his evenings in their society.

“As to his intellectual character, and his talents and attainments as a lawyer, a statesman, and an orator, I shall say nothing. I do not pretend to measure the extent of his mind, or to add any thing to the general voice which has placed him at the head of the great men of our country. As to his attainments and his tastes in minor matters—besides a competent share of classical learning, he had a general acquaintance with modern literature: but I do not believe that he was fond of light Eng-

lish literature ; though he seemed to make it a point of keeping along with the age, and, therefore, read all the popular poems, reviews and novels, and talked about them very well. But his great forte (as to his literary accomplishments) was his thorough and exact acquaintance with the English language—with its best models of diction—with its significations, its grammar, and its pronunciation. Upon this he prided himself exceedingly, and well he might ; for you know the singular art and skill with which he displayed his mastery over his own language—his power of using it with astonishing force, elegance, and accuracy in the simplest conversation upon common topics, in his legal arguments which were to instruct and influence the finest minds in the country, and in the debates of the senate which were to affect permanently and vitally the destinies of the nation.”

The following is a letter written to Mr. Monroe by Mr. Pinkney just before his leaving Russia.

“ ST. PETERSBURG, 21st January, 1818.

“ MY DEAR SIR,—I had the honour to receive to-day (and I cannot tell you with how much pleasure) your very kind letter of the 10th of November. It came by the route of Sweden, but not accompanied by any thing from Mr. Rush or Mr. Adams, or by my expected recall. I presume that the next mail (by the route of Hamburg) will bring me all that is wanting to justify my return to the United States.

“ I pray you to be assured that I view your forbearing to name me for the court of England exactly as you do, and that I rejoice you took that course. It would certainly have been hazardous ; and, moreover, I had no wish to go to England, or to remain any longer abroad. The office of Attorney-General would not have suited me ; as I have some time since taken measures for resuming my residence at Baltimore, where I hope to retrieve the losses which my missions could not fail to inflict upon me in a pecuniary sense. Those losses are, indeed, somewhat severe ; but they have been incurred in the public service,

and if Providence spares and assists me, will not long be felt. Your friendly wishes are really invaluable. I do not want office, but I prize highly your esteem. My desire is to be a mere lawyer, and to show my disinterested respect and affection for you in a private station. For this reason I beg of you to think of me only as a friend for whom office has long since ceased to have any charms, and who only courts opportunities of proving his devotion to the character and interests of his country, and his attachment to those for whom he professes regard and reverence. Do me the favour always to regard me in this light, and you will not be disappointed in me.

“Notwithstanding my anxiety to get home, I shall quit this station with some regret. They have been very good to me here. The state of the world too requires that we should have a good stock of prudence at this court; and I feel quite sure that on that score I should never be found deficient. My place, however, will doubtless be supplied by a man much more able and distinguished, and at the same time of equal discretion. You cannot put too much ability and character into this mission. One of the foremost men of our country ought to be selected for it. A Chargé d’Affaires may be left here for some time; but when a Minister Plenipotentiary is appointed, he should be of marked political rank. My own health, and that of my family, has recruited a little. My intention, therefore, is to set out for Hamburg as soon as my recall has arrived, and I have had my audience of the Emperor, who is expected in about ten days. At Hamburg I think I shall be able to get a ship for my homeward voyage.

“Accept my unfeigned thanks for your uniform kindness, which is deeply impressed upon my heart, and my assurances of unalterable respect and attachment.”

Soon after Mr. Pinkney’s return from Russia, a controversy arose respecting the right of the

State legislatures to tax the Bank of the United States, which was brought before the Supreme Court in the year 1819, upon a writ of error to the Court of Appeals of Maryland, which had given judgment against the bank for the penalties provided for not paying the tax imposed by a law of that State. On this occasion, Mr. Pinkney had given his opinion, that the State law was unconstitutional, and had been retained by the Bank to argue in support of that opinion.

The following is the exordium to the argument which he delivered.

“ In the catalogue of those petty vexations, which are said to constitute the miseries of human life, I know of nothing more irksome than to be compelled to speak to a well informed tribunal upon topics that have lost all the grace of novelty, upon which genius and learning have been so often exercised, that he who seeks to be either smart or profound in the discussion of them, can scarcely fail to be accused of pilfering the felicities of expression of some predecessor in the argument, or of appropriating to his own use the sagacious reflections of some report, or pamphlet, or speech, on which, in the days of their freshness, an intellectual epicure might have delighted to banquet, but which endless repetition and long continued familiarity have robbed of almost all dignity and interest.

“ Such undoubtedly was, at the commencement of this debate, the situation of many of the topics which have been forced into it by our learned opponents (I may be permitted to say) against all the remonstrances of taste, if not of prudence ; and it will not be imagined that this their situation has been much improved by what has since occurred. On the contrary, it may in all reason be supposed that what was at first only threadbare, has now been worn to tatters ; and that consequently very little is left for me but miserable shreds and ragged odds and ends, the *tristes reliquæ* of those who have gone before me. Such a predicament

is certainly not to be envied ; and, foreseeing, I would have avoided it. Accordingly, I made it my humble suit to the learned representatives here of that erring State of which I am an unworthy citizen, that we might not on this occasion, by unhallowed rites, wantonly conjure up the ghost of a departed controversy ; that THE CONSTITUTIONALITY OF THE BANK, if it could not be assumed, might at least be submitted in respectful silence to this high court, to which our lucubrations, or rather our *recollections*, upon it, could hardly be expected to afford either pleasure or instruction. In an especial manner I urged to one of the learned gentlemen* (who has in his recent speech reconciled an admirable playfulness of fancy with great apparent severity of reasoning, and placed many a flowery wreath upon the grave and forbidding brows of metaphysical subtlety) my extreme repugnance to entering the lists with him upon so stale a quarrel. I said to him in the language of Diomed, as reported by the ambassador of Latinus :—

Ne verò, ne me ad tales impellite pugnas.

But I obsecrated and deprecated in vain ; his sturdy and inexorable infidelity seemed to rejoice in the prospect of displaying itself with an ostentation worthy of better principles ; he appeared to expect, with feelings bordering upon transport, the approaching opportunity of pouring his heresies into our pious ears, and of disturbing, with the restless zeal of an obstinate sectary, that wholesome faith in the bosom of which we had sought and found, what man seldom finds, however industriously soever he may seek it, Tranquillity and Repose. The consequence is, that the question of the CONSTITUTIONALITY OF THE BANK has risen, as it were, from the grave, and in its very shroud presents itself before you, to demand at last the honours of Christian burial, in such sort that it may hereafter hope to rest

* Mr. Jones.

in peace, beyond the reach of the lawless incantations of these potent sorcerers and their confederates.

“As for the cause itself, Sir, I am not only ready to concede, but anxious to maintain, that the aggregate of the considerations which it involves, impart to it a peculiar character of importance; and that this tribunal, distinguished as it is for all that can give to judicature a title to reverence, is, in adjudicating upon it, in the exercise of its most exalted—its most awful functions. The legislative faculties of the government of the Union, for the prosperity of the Union, are in the lists, not indeed upon the romantic and chivalrous principles of tilts and tournaments, but upon the sacred principles of the constitution. In whatever direction you look, you cannot but perceive the solemnity, the majesty of such an occasion. In whatever quarter you approach the subject, you cannot but feel that it demands from you the firm and steady exertion of all those high qualities which the universal voice ascribes to those who have devoted themselves to the ministry of this holy sanctuary. For myself, the importance of this cause, incapable as it is of being overvalued, does not dismay me; it does but excite me to deal with it as I ought; I am glad that it is of the deepest interest to us all. I meditate with exultation, not fear, upon the proud spectacle of a peaceful judicial review of these conflicting sovereign claims by this more than Amphictyonic council. I see in it a pledge of the immortality of the Union, of a perpetuity of national strength and glory, increasing and brightening with age,—of concord at home, and reputation abroad.

“Our opponents think of the importance of this cause as I do. They have, therefore, put forth their whole power in the argument of it. All the graces of a polished elocution, within the reach of two of the learned counsel; all that more robust and hardy wit, within the reach of the other, which makes a jest of the climate of Kamschatka and amuses itself with the frost of the Pole; all the artifices of a cunning and disciplined logic more or less within the reach of all the learned counsel, have been exhausted upon it. We have had the affecting retrospections of Mr. Martin, upon scenes ‘*quorum pars magna (or minima) fuit*,’ (for I will not

object to his amendment,* lest I should distress the modesty that suggested it,) which scenes, luckily for the time of the court, had their commencement at an epoch considerably subsequent to the flood ; we have had the appalling, though elegant, prophecies of Mr. Jones, predicting political pestilence and war, as an almanack predicts cloudy weather and tempest ; and we have had the urgent instances of Mr. Hopkinson, that we should look neither backwards nor forwards, but fix our intellectual gaze, with a laudable intensity, upon the circumstances and necessities of the present moment. Indeed, what have we not had that could contribute to the credit of the learned counsel, without contributing to the profit of the cause ?

“ It is proper, however, that I should in this place admit, that, although the speeches of the counsel on the other side have, with reference to the doctrines which they inculcate, left me as great an unbeliever as they found me, the speech of *one of them* has not wholly lost its effect upon me, since it has served to enhance the lively interest which I had before taken in this controversy. The speech to which I allude, was one which the most eloquent might envy, the most envious could not forbear to praise. It was a finely woven tissue of sophistry, tinctured with an occasional declamation, far more vivid than the hypocritical disclaimer which prefaced it could lead us to anticipate, and drapened with those captivating figures which fancy can bestow at will upon that which is intended to be the garb of delusion. In this speech, the Attorney for the District of Columbia indulged in frequent lamentations over the consequences which he foresaw, or affected to foresee, must inevitably result from that decision which every one feels and knows cannot fail to be pronounced in this cause. Rapt into future times, like the bards of old, he sung, upon that hypothesis, of internal resistance and commotions—‘ of moving accidents by flood and field’—of ‘ direful struggles’ and ‘ tremen-

* Mr. Martin had said, in speaking of the transactions of the Convention that proposed the constitution of the United States, and of which he was a member,—“ *quorum pars minima fui* ”

† Mr. Jones had in the outset of his speech deplored his incapacity for all rhetorical or declamatory ornament.

dous convulsions'—that should shake the Union to its centre and bring it down in ruins upon our heads! The domain of poetry was invaded, all nature was ransacked, for images which might recommend the wildest possibilities and probabilities as substitutes for the sober calculations of enlightened reason. These miserable STATE JEALOUSIES, which the learned counsel seems, in the language of Milton, to consider as 'hovering angels, girt with golden wings,'—but which, in my estimate of their character, attended like MALIGNANT INFLUENCES at the birth of the constitution, and have ever since dogged the footsteps of its youth—may be said to have been summoned by him to testify in this cause, to give to this court their hysterical apprehensions and delirious warnings, to afflict our understandings with the palsy of fear, to scream us, as it were, into a surrender of the last, the only fortress of the common felicity and safety, by capitulating with those petty views and local feelings which once assailed us, in the very cradle of our independence, as the serpents of Juno assailed the cradle of Hercules, and were then upon the point of consigning us to everlasting perdition.

“When principles, such as I have just adverted to, are announced from a quarter which every thing that is excellent in intellect and morals contributes to make respectable, it is high time that we should be informed, by the authentic responses of the appointed oracles of the constitution, in what spirit that constitution is to be interpreted;—it is high time that we should be made to understand whether we are already relapsed into the more than infantine feebleness of the *Confederacy*, or whether we may yet venture to impute to the actual constitution that manly strength which can alone enable it to become the champion of the general prosperity against all those assaults to which, in the vicissitudes of human affairs, and according to the ordinary lot of human institutions, it cannot fail to be exposed.

“Sir, it is in this view that I ascribe to the judgment that may be pronounced in this cause, a mighty, a gigantic influence, that will travel down to the latest posterity, and give shape and character to the destinies of this republican empire. It is not merely that it may stabilize or pull down a financial and commercial institution called a Bank—however essential such an institution may be to the government and country. I have a deep

and awful conviction (which the speech of my learned friend has confirmed) that upon that judgment it will mainly depend whether the constitution under which we live and prosper is to be considered, like its precursor, a mere phantom of political power to deceive and mock us—a pageant of mimic sovereignty, calculated to raise up hopes that it may leave them to perish,—a frail and tottering edifice, that can afford no shelter from storms either foreign or domestic—a creature half made up, without heart or brain, or nerve or muscle,—without protecting power or redeeming energy—or whether it is to be viewed as a competent guardian of all that is dear to us as a nation.”

* * * * *

It is to be regretted that the means no longer exist of completely restoring this admirable speech, which occupied three days in the delivery, and contained an exposition of the leading principles to be applied in interpreting the constitution, which were made the foundation of the judgment pronounced by the Court exempting the national Bank from taxation by the respective States. I have, however, endeavoured, with the aid of my own notes taken at the time, and those of Mr. Pinkney, which have been since put into my hands, to recover the substance of his argument.*

Mr. Pinkney having been elected by the legislature of Maryland a Senator in Congress from that State, took his seat in the Senate on the 4th of January, 1820 ; and the bill from the House

* See PART SECOND, No. VI.

of Representatives for the admission of Missouri into the Union, with a clause prohibiting the introduction of slaves into the new State, being under consideration, delivered, on the 15th of February, a very elaborate speech in opposition to the proposed restriction, of which I have collected some fragments. He insisted that Congress had no power by the constitution to impose such a condition upon the admission of a State into the federal Union.*

The result of the discussion of this momentous question in Congress is well known. Mr. Pinkney, in a letter to his son-in-law, Mr. Cumberland D. Williams, dated the of February, says :

"The bill for the admission of Missouri into the Union (*without* restriction as to slavery) may be considered as past. That bill was sent back again this morning from the House *with the restriction as to slavery*. The Senate voted to amend it by striking out the restriction, (27 to 15) and proposed, as another amendment, what I have all along been the advocate of, a restriction upon the vacant territory to the north and west as to slavery. To-night the House of Representatives have agreed to *both* of these amendments, in opposition to their former votes, and this affair is settled. To-morrow we shall (of course) recede from our amendments as to *Maine*, (our object being effected,) and both States will be admitted. This happy result has been accomplished by the Conference, of which I was a member on the part of the Senate, and of which I proposed the report which has been made. * * * *

"I hope it will be possible for me to return to Baltimore on

* See PART SECOND, No. VII.

Saturday for a few days. A bankrupt law will, as I think, pass, although it will be much opposed. My assistance on that subject will be necessary. My professional duties have been sacrificed to my political duties, and my constituents will, I trust, give me some credit for this. The Quakers have found my speech of 1789 in the House of Delegates (my second speech) in pamphlet form, and have sent it to members of both Houses. They have sent one copy to me. After a hasty perusal of it, I think it will not disgrace me; and I should not care if they should think it worth while to republish it."

In framing the complex political system by which the United States are governed, one of the most difficult problems which occurred, was the manner of determining controversies which might arise under acts of the local State legislatures conflicting with the constitution, laws, and treaties of the Union. All agreed in the necessity of declaring the supremacy of the latter, but the manner in which it should be practically enforced presented a question of great difficulty. One of the schemes presented to the Convention contemplated a revision by the federal government of all acts passed by the State legislatures, and a negative to be vested in the former in order to prevent the passage of laws repugnant to those of the Union. But it was finally determined, as a less objectionable means of accomplishing the same end, to extend the judicial power of the United States to all cases arising under the con-

stitution, laws, and treaties of the Union ; making the Supreme Court the appellate tribunal in such cases, with such exceptions and under such regulations as Congress might provide. Under this constitutional provision, instead of giving to the national Courts *original* jurisdiction of these cases, as might have been done, all that Congress has deemed it expedient to do, has been to provide for the exercise of the appellate jurisdiction of the Supreme Court over all such cases arising in the State Courts. The jurisdiction had been exercised by the Supreme Court in this manner in a great variety of cases since the year 1789, and the constitutionality of the act of Congress was never questioned until 1815, when, on the reversal by the Supreme Court (in the case of *Martin and Hunter*) of a judgment of the Court of Appeals of the State of Virginia, and a mandate issued to the latter, that Court refused to obey the mandate, upon the ground that the constitution did not authorize Congress to vest the Supreme Court with appellate jurisdiction over the decisions of the State Courts. The question was again reviewed by the Supreme Court, and the jurisdiction solemnly determined to be constitutionally vested. The question was believed to be thus finally settled, but it was again agitated in 1821, in the celebrated case of *Cohens against the State of Virginia*. This case arose upon the act of Congress empowering the Corporation of the City of Washington to authorize the drawing of lotteries for certain purposes ; and

the principal question was, whether this Act extended to authorize the Corporation to sell the tickets in such lotteries in those States where the selling of lottery tickets was prohibited by the local laws. Mr. Pinkney had given an opinion, in conjunction with other eminent counsel, (but which was drawn up by him,) that Congress might, under its power of exclusive legislation over the District of Columbia, authorize the Corporation of the City of Washington to sell its lottery tickets in any part of the Union, notwithstanding any State law prohibiting it, and that Congress had in fact, by the act now in question, authorized the Corporation to sell its lottery tickets throughout the Union.* The Court, however, deemed it unnecessary to consider whether the act of Congress would be constitutional, supposing it to authorize the Corporation thus to force the sale of lottery tickets in States where it was prohibited by the local laws, because it was of opinion that the act did not purport in its terms to give such an authority to the Corporation. Mr. Pinkney was prevented by accidental circumstances from arguing this question before the Court, but upon the other part of the cause, as to the appellate jurisdiction, he pronounced one of his most elaborate and able arguments. His reasoning in favour of the jurisdiction was adopt-

* See PART SECOND, No. VIII.

ed by the Court ; and it may now be regarded as one of those points of constitutional law which are most conclusively and satisfactorily established.

Mr. Pinkney continued his professional labours at the session of the Court in 1822, with the same intense application and ardent desire of success which had marked his whole career. He also took a part in the preliminary discussions upon the Bankrupt bill in the Senate, and prepared himself for the debate upon the Maryland propositions relating to the appropriation of the public lands belonging to the Union for the purposes of education.* But his busy life was hurrying to a conclusion. He had exerted himself in the investigation and argument of a cause in which he felt peculiar interest, at a time when the state of his health unfitted him for application to study and business. On the 17th of February, he was attacked by a severe indisposition, which was, doubtless, produced by this effort. He mentioned to a friend that he had sat up very late in the night on which he was taken ill, to read the *Pirates*, which was then just published, and made many remarks respecting it,—drawing comparisons between the two heroines, and criticising the narrative and style with his usual confident and decided tone, and in a way which showed that his imagination had been a good deal excited by

* See North American Review, vol. iv. p. 310—New Series.

the perusal. From this period till his death he was a considerable part of the time in a state of delirium. But in his lucid intervals, his mind reverted to his favourite studies and pursuits, on which, whenever the temporary suspension of his bodily sufferings enabled him, he conversed with great freedom and animation. He seems, however, to have anticipated that his illness must have a fatal termination, and to have awaited the event with patient fortitude. After a course of the most acute suffering, he breathed his last on the night of the 25th of February.

The striking impression produced by the circumstances of his death, cannot be better described than in the following extract from a letter which has been attributed to an eminent scholar, very capable of estimating the intellectual endowments of Mr. Pinkney.

“WASHINGTON, *March 1st*, 1822.

“The death of Mr. Pinkney, is the remarkable and engrossing circumstance of the present week, in this metropolis. Besides the reflections connected with the sudden privation of abilities so splendid, and knowledge so profound, as those by which the deceased was distinguished in his profession, other startling thoughts must have risen in the minds of that portion of the spectators who were capable of a serious mood, and who had seen him such as he was only ten or twelve days before—full of confidence, in his vigour and his fortunes, exulting in the supremacy of his powers and reputation, and earnest to maintain it, by every mode of strenuous exertion. He had reached the age at which, in this country, dissolution is not deemed altogether premature, and the feelings by which the lawyer and orator is impelled to extreme effort for invariable triumph in his career, usually abate; when

he becomes, in some degree, visibly fatigued with the race, and comparatively unambitious of its honours. But every thing about this brilliant personage, inspired the idea of the strongest vitality; of ripe, but enduring faculties of mind; of unabated ardour and hope in the pursuit of fame, and the keenest fruition of the successes of life. Hence, his sudden exit was calculated to produce the liveliest impression of the fragility of human reliance and the vanity of terrestrial plans. As he had attained so much of mental power and various reputation, and the idea of a term to the enjoyment of what he had won in resources and dignities, did not intrude itself upon any observer, the lesson was more striking and forcible, than if the case had been that of a more youthful man, struggling with every promise of success for the same possessions.

"It is believed that the last illness of Mr. P. was occasioned by an excessive effort in the preparation and delivery of an argument, within the few days immediately preceding the attack. It is said that he consumed all the night of Thursday week in framing his brief. When he spoke in court on Friday, he evidently laboured under a severe cold, and exerted himself beyond his strength—he was obliged several times to ask the indulgence of the Bench, while he sat down to rest for a few minutes, and to recover his breath. Some of the Bar remarked to him that he would do wrong to proceed, seeing that he was indisposed and enfeebled. But his zeal was not to be repressed on this occasion, as it had not been on any similar one.

"I have heard a distinguished lawyer, who had practised long in the same courts with him, remark of him, that he did not believe that he ever undertook a cause, however insignificant it might be, without entering into it, as it were, with his whole soul, and managing it as if his whole professional reputation were at stake upon the issue. It was his pride and passion never to appear in court, but after having entirely mastered the business which he was to transact. Sleep, exercise, the pleasures of society, he was always ready to renounce, rather than hazard the loss of an inch of the ground which he had gained, or seem at any moment unequal to his reputation. Does not the nature of his end remind you of Cicero's relation of that of Lucius Crassus, an orator whom he resembled in the intensity of his ardour

to excel, and the extent of his influence over the minds of his hearers ?

“Post ejus interitum veniebamus in curiam, ut vestigium illud ipsum in quo ille postremum institisset, contueremur. Namque, tum latus ei dicenti condoluisse, sudoremque multum consecutum esse audiebamus : ex quo cùm cohorruisset, cum febris domum rediit : dietque septimo est consumptus. O fallacem hominum spem, fragilemque fortunam et inanes nostras contentiones ! quæ in medio spatio sæpe franguntur et corruunt, et antè in ipso cursu obruuntur, quàm portum conspicerè potuerunt.”

At the opening of the Supreme Court on the morning after Mr. Pinkney's death, Mr. Harper addressed the court, and requested an adjournment to the next day, in order to enable the bar to express its regret at the loss the profession and the public had sustained. He stated that the tribute which was due to the memory of their departed brother could no where be more properly paid than in that place, where the pre-eminent talents and acquirements by which he adorned the profession had been so often displayed, and where he had taken so large a part in fixing those great legal and constitutional landmarks by which that court had conferred the most solid and extensive benefits upon the nation. Mr. Chief Justice Marshall spoke with great feeling in reply, and observed that the judges participated sincerely in the sentiments expressed at the bar, and lamented the death of Mr. Pinkney as a loss to the profession, and to the country at large ; and that they most readily assented to the motion which had been made. After the ad-

jourment of the Court, the members of the bar assembled in the Court-room ; and Mr. Clay having been called to the chair, it was, on motion of Mr. Harper, seconded by Mr. Webster, unanimously resolved, that the bar, as a mark of their respect for the memory of their deceased brother, and of their deep sense of the loss which the public and the profession had sustained in his death, would attend his funeral in a body, and wear crape on the left arm during the term. The usual resolutions on similar occasions were also passed by both houses of Congress, and his funeral was attended by the members, by the heads of the executive departments, the foreign ministers, the judges and bar of the Supreme Court, and a numerous concourse of citizens, with all those marks of reverential sorrow and respect which were due to the character and eminent station of the deceased.

The following extract from a sermon preached in the House of Representatives on the Sunday following the death of Mr. Pinkney, by the Rev. Mr. Sparks, one of the chaplains of Congress, will further illustrate the strong impression produced on the public mind by that event.

“ But there is a greater moralist still ; and that is, *Death*. Here is a teacher who speaks in a voice which none can mistake ; who comes with a power which none can resist. Since we last assembled in this place, as the humble and united worshippers of God, this stern messenger, this mysterious agent of Omnipotence, has come among our numbers, and laid his wither-

ing hand on one, whom we have been taught to honour and respect ; whose fame was a nation's boast, whose genius was a brilliant spark from the æthereal fire, whose attainments were equalled only by the grasp of his intellect, the profoundness of his judgment, the exuberance of his fancy, the magic of his eloquence.

“ It is not my present purpose to ask your attention to any picture drawn in the studied phrase of eulogy. I aim not to describe the commanding powers and the eminent qualities which conducted the deceased to the superiority he held, and which were at once the admiration and the pride of his countrymen. I shall not attempt to analyze his capacious mind, nor to set forth the richness and variety of its treasures. The trophies of his genius are a sufficient testimony of these, and constitute a monument to his memory, which will stand firm and conspicuous amidst the faded recollections of future ages. The present is not the time to count the sources or the memorials of his greatness. He is gone. The noblest of heaven's gifts could not shield even him from the arrows of the destroyer ; and this behest of the Most High is a warning summons to us all. When death comes into our doors, we ought to feel that he is near. When his irreversible sentence falls on the great and the renowned, when he severs the strongest bonds which can bind mortals to earth, we ought to feel that our own hold on life is slight, that the thread of existence is slender, that we walk amidst perils, where the next wave in the agitated sea of life may baffle all our struggles, and carry us into the dark bosom of the deep.”

Having already anticipated most of the particulars which must be combined in order to form a just estimate of the eminent individual of whom I have endeavoured to collect a few scattered traits, I will not detain the reader by attempting to blend them together in a studied portrait. In tracing the principal outlines of his public charac-

ter, his professional talents and attainments must necessarily occupy the most prominent place. To extraordinary natural endowments, Mr. Pinkney added deep and various knowledge in his profession. A long course of study and practice had familiarized his mind with the science of jurisprudence. His intellectual powers were most conspicuous in the investigations connected with that science. He had felt himself originally attracted to it by invincible inclination ; it was his principal pursuit in life ; and he never entirely lost sight of it in his occasional deviations into other pursuits and employments. The lures of political ambition and the blandishments of polished society—or perhaps a vague desire of universal accomplishment and general applause, might sometimes tempt him to stray for a season from the path which the original bent of his genius had assigned him. But he always returned with fresh ardour and new delight to his appropriate vocation. He was devoted to the law with a true enthusiasm ; and his other studies and pursuits, so far as they had a serious object, were valued chiefly as they might minister to this idol of his affections.

It was in his profession that he found himself at home ; in this consisted his pride and his pleasure : for as he said, “ the bar is not the place to acquire or preserve a false or fraudulent reputation for talents,”—and on that theatre he felt conscious of possessing those powers which would command success.

Even when abroad he never entirely neglected his legal studies. But at home, and when actively engaged in the practice of his profession, he toiled with almost unparalleled industry. All other pursuits,—the pleasures of society, and even the repose which nature demands, were sacrificed to this engrossing object. His character, in this respect, affords a bright example for the imitation of the younger members of the profession. This entire devotion to his professional pursuits was continued with unremitting perseverance to the end of his career. If the celebrated Denys Talon could say of the still more celebrated D'Aguesseau, on hearing his first speech at the bar,—“*that he would willingly END as that “young man COMMENCED,”*—*every youthful aspirant to forensic fame among us might wish to begin his professional exertions with the same love of labour, and the same ardent desire of distinction which marked the efforts of William Pinkney throughout his life. This intense application and untiring ambition continued to animate his labours to the last moments of his exis-

* M. D'AGUESSEAU avait fait le premier essai de ses talens dans le charge d'Avocat ou châtelet, où il entra à l'âge de vingt-un ans : et quoiqu'il ne l'eût exercée que quelques mois, son pere ne douta pas qu'il ne fût pas capable de remplir une troisieme charge d'Avocat Général au Parliement, qui venait d'être créée. Il y parut d'abord avec tant d'éclat, que le célèbre DENIS TALON, alors Président à Mortier, dit *qu'il voudrait finir comme ce jeune homme commençait.* Abregé de la Vie de M. le Chancillier d'Aguesseau.

tence ; and as he held up a high standard of excellence in this noble career, he pursued it with unabated diligence and zeal, and still continued to exert all his faculties as if his entire reputation was staked on each particular display. He guarded with anxious and jealous solicitude, the fame he had thus acquired. The editor well remembers in the last, and one of his most able pleadings in the Supreme Court, remonstrating with him upon the necessity of his refraining from such laborious exertions in the actual state of his health, and with what vehemence he replied—THAT HE DID NOT DESIRE TO LIVE A MOMENT AFTER THE STANDING HE HAD ACQUIRED AT THE BAR WAS LOST, OR EVEN BROUGHT INTO DOUBT OR QUESTION.

What might not be expected from professional emulation directed by such an ardent spirit, and such singleness of purpose even if sustained by far inferior abilities ! But no abilities, however splendid, can command success at the bar without intense labour and persevering application. It was this which secured to Mr. Pinkney the most extensive and lucrative practice ever acquired by any American lawyer, and which raised him to such an enviable height of professional eminence. For many years he was the acknowledged leader of the bar in his native State ; and during the last ten years of his life, the principal period of his attendance in the Supreme Court of the nation, he enjoyed the reputation of having been rarely equalled and perhaps never excelled in the power of reasoning upon legal subjects. This was

the faculty which most remarkably distinguished him. His mind was acute and subtle, and at the same time comprehensive in its grasp,—rapid and clear in its conceptions, and singularly felicitous in the exposition of the truths it was employed in investigating. He had the command of the greatest variety of the most beautiful and appropriate diction, and the faculty of adorning the driest and most unpromising subjects. His style does not appear to have been originally modelled after any particular standard, or imitated from the example of any particular writer or speaker. It was formed from his peculiar manner of investigating and illustrating the subjects with which he had to deal, and was impressed with the stamp of his vigorous and comprehensive intellect. When it had received all the improvement which his maturer studies and experience in the practice of extemporaneous and written composition enabled him to give it, his diction more nearly approached to the model of that pure, copious, and classical style which graced the judicial eloquence of Sir William Scott, than to any other known standard. But it had somewhat more of amplitude, and fulness, and variety of illustration, and of that vehement energy which is looked for in the pleadings of an advocate, but which would be unbecoming the judgment-seat. It also borrowed occasionally the copiousness, force, and idiomatic grace, and the boldness and richness of metaphor, which distinguish the old writers of English prose. But in all its essential qualities,

Mr. Pinkney's style was completely formed long before he had the advantage of studying any of these models of eloquence. The fragments of his works which are collected in this volume will enable the reader to form some judgment both of its characteristic excellencies and defects. But after all, the great fame of his eloquence must rest mainly in tradition, as no perfect memorials of his most interesting speeches at the Bar or in the Senate have been preserved; besides that so much of the reputation of an orator depends upon those glowing thoughts and expressions which are struck out in the excitement and warmth of debate, and which the speaker himself is afterwards unable to recover. Most of the poetry of eloquence is of this evanescent character. The beautiful imagery which is produced in this manner, from the excitement of a rich and powerful mind, withers and perishes as soon as it springs into existence; and the attempt to replace it by rhetorical ornament, subsequently prepared in the cold abstraction of the closet, is seldom successful. Hence some portions of Mr. Pinkney's speeches, which were begun to be written out by himself with the intention of publishing them, will be found, perhaps, to be somewhat too much elaborated, and to bear the marks of studied ornament and excessive polish: but the editor is enabled to assert, from his own recollection, that whilst they have certainly lost in freshness and vigour by this process, in no instance have these more striking passages been improved in splen-

dour of diction, and variety and richness of ornament. Indeed, he often poured forth too great a profusion of rhetorical imagery in extemporaneous composition. His style was frequently too highly wrought and embellished, and his elocution too vehement and declamatory for the ordinary purposes of forensic discussion. But whoever has listened to him even upon a dry and complicated question of mere technical law, where there seemed to be nothing on which the mind delighted to fasten, must recollect what a charm he diffused over the most arid and intricate discussions by the clearness and purity of his language, and the calm flow of his graceful elocution. His favourite mode of reasoning was from the analogies of the law; and whilst he delighted his auditory by his powers of amplification and illustration, he instructed them by tracing up the technical rules and positive institutions of jurisprudence to their original principles and historical source. He followed the precept given (I think) by Pliny, and *sowed his arguments broad-cast*, amplifying them by every variety of illustration of which the subject admitted, and deducing from them a connected series of propositions and corollaries, gaining in beautiful gradations on the mind, and linked together by an adamant chain of reasoning.

Of the extent and solidity of his legal attainments, it would be difficult to speak in adequate terms, without the appearance of exaggeration. He was profoundly versed in the ancient learning

of the common law; its technical peculiarities and feudal origin. Its subtle distinctions and artificial logic were familiar to his early studies, and enabled him to expound with admirable force and perspicuity the rules of real property. He was familiar with every branch of commercial law; and superadded, at a later period of his life, to his other legal attainments, an extensive acquaintance with the principles of international law, and the practice of the Prize Courts. In his legal studies he preferred the original text writers and reporters, (*à fontibus hauriri*,) to all those abridgments, digests, and elementary treatises, which lend so many convenient helps and facilities to the modern lawyer, but which he considered as adapted to form sciolists, and to encourage indolence and superficial habits of investigation. His favourite law book was the Coke Littleton, which he had read many times. Its principal texts he had treasured up in his memory, and his arguments at the bar abounded with perpetual recurrences to the principles and analogies drawn from this rich mine of common law learning.

Different estimates have been made of the extent and variety of his merely literary accomplishments. He was not what is commonly called a learned man; but he excelled in those branches of human knowledge which he had cultivated as auxiliary to his principal pursuit. Among his other accomplishments, (as has been before noticed,) he was a thorough master of the English language,—its grammar and idiom,—its terms and

significations,—its prosody, and in short, its whole structure and vocabulary. It has also been before intimated that speaking with reference to any high literary standard, his early education was defective. He had doubtless acquired in early life some knowledge of classical literature, but not sufficient to satisfy his own ideas of what was necessary to support the character of an accomplished scholar. He used to relate to his young friends an anecdote, which explains one of the motives that induced him, at a mature age, and after he had risen to eminence, to review and extend his classical studies ; and at the same time illustrates one of the most remarkable traits of his character—that resolution and firmness of purpose with which he devoted himself to the acquisition of any branch of knowledge he deemed it desirable to possess. During his residence in England, some question of classical literature was discussed at table in a social party where he was present, and the guests, in turn, gave their opinions upon it : Mr. Pinkney being silent for some time, an appeal was at length made to him for his opinion, when he had the mortification of being compelled to acknowledge that he was unacquainted with the subject. In consequence of this incident he was induced to resume his classical studies, and actually put himself under the care of a master for the purpose of reviewing and extending his acquaintance with ancient literature.

But the acquisition of such knowledge may be recommended, and no doubt was sought by Mr. Pinkney for a higher purpose than merely completing the circle of liberal accomplishments. He never afterwards neglected to cultivate an attainment which he found so useful in enlarging his knowledge of his own language, improving his taste, and strengthening and embellishing his forensic style. Attempts have recently been made to depreciate the utility of classical learning ; and certainly the expediency of devoting the greater part of the time spent in education to the acquisition of the languages of Greece and Rome may well be questioned. But “there is a certain period of life, when the mind like the body is not yet firm enough for laborious and close operations. If applied to such, it falls an early victim to premature exertion : exhibiting indeed at first, in those young and tender subjects, the flattering appearance of their being men while they yet are children, but ending in reducing them to be children when they should be men. The memory is then most susceptible and tenacious of impressions ; and the learning of languages being chiefly a work of memory, it seems precisely fitted to the powers of this period, which is long enough too for acquiring the most useful modern as well as ancient languages.”* And, we may add, that the bright examples of

* Jefferson's Notes, Query XIV.

ancient virtue, and the perfect models of ancient taste, are best studied in the originals. That generous love of fame, of country, and of liberty, which was the animating soul of the Grecian and Roman republics, cannot be too early imbibed by the youth of every free state ; and whilst they are taught duly to estimate the more wise and perfect organization of modern societies, they should be warmed and cheered with those noble sentiments which illuminate the pages of the eloquent writers of antiquity, and which are the best fruits, and at the same time the surest preservatives of liberal institutions.

During the whole course of his active and busy life, Mr. Pinkney pursued his professional studies, and those which related to the English language and literature, with the strictest method and the most resolute perseverance. But, in other respects he seems to have read in the most desultory manner possible ; in such a way, perhaps, as any man would be likely to pursue, who, with a vigorous intellect, and a disposition to industry, had no very precise object before him but to gratify his curiosity and to keep pace with the current literature of the day. His tenacious memory enabled him to retain the stores of miscellaneous knowledge he had thus acquired, and his mind was enriched with literary and historical anecdote, which constituted the principal interest of his conversation, the charm of which was heightened by the facility and habitual elegance of his colloquial style.

Whether he was endowed by nature with those large and comprehensive views, and that extensive knowledge of mankind which constitute the qualifications of a great statesman, and which would have fitted him to take a leading part in the political affairs of his country, and to guide its public councils in those moments of difficulty when "a new and troubled scene is opened, and the file affords no precedent,"—is a question which we have no adequate means of determining. His diplomatic correspondence will show indeed that he was perfectly competent to maintain his own reputation for general talent, and to acquit himself in a manner creditable to his country, when brought in contact with the ablest and most experienced statesmen of Europe. But, as has been before observed, his profession was the engrossing pursuit of his life; and beyond that, his talents shone most conspicuously in those senatorial discussions which fall within the province of the constitutional lawyer. In the various questions relating to the interpretation of the national constitution which have been recently discussed in the Supreme Court, it may be said, it is hoped, without irreverence, that Mr. Pinkney's learning and powers of reasoning have very much contributed to enlighten and fix its judgments. In the discussion of that class of causes, especially, which, to use his own expressions, "presented the proud spectacle of a peaceful judicial review of the conflicting sovereign claims of the government of the Union and the particular States

"by this more than Amphictyonic council,"—his arguments were characterized by a fervour, earnestness, gravity, eloquence, and force of reasoning, which convinced all who heard him that he delivered his own sentiments as a citizen, and was not merely solicitous to discharge his duty as an advocate. He exerted an intellectual vigour proportioned to the magnitude of the occasion. He saw in it "a pledge of the immortality of the Union,—of a perpetuity of national strength and glory, increasing and brightening with age, —of concord at home, and reputation abroad."

As to the general nature and operation of our federative system, he thought with the illustrious authors of the letters of *Publius*, that like other similar forms of government recorded in history, its tendency was rather to anarchy among the members than tyranny in the head, and that a general government, at least as energetic as that intended to be established by the framers of the constitution, was indispensably necessary to secure the great objects of the Union. Believing these to be, generally speaking, in more peril from excessive jealousy on the part of the respective members of the Confederacy, than from encroachments by the national government, he carried the weight of his support to that side of the vessel of state which he thought to be in danger of losing its equipoise. Absolute unanimity is not to be expected on questions of such intrinsic difficulty as those which spring up on that debatable ground which marks the boundaries between the State

and national sovereignties. Still less is it to be looked for in the discussion of such a controversy as that arising from the admission of the State of Missouri into the Union, where so many deep-seated prejudices and passions mingled in the debate, and a contest for political power and claims of private interest were involved in the result. That mighty tempest, which at one time seemed to shake the Union to its centre, and in the language of Mr. Pinkney, threatened to "push from its moorings the sacred ark of the common safety, and to drive this gallant vessel, freighted with every thing dear to an American bosom, upon the rocks, or lay it a sheer hulk upon the ocean,"—has now passed away. But the agitation of the billows has not yet subsided; and a distant posterity will alone be capable of pronouncing an impartial judgment upon the merits of a question complicated of so many considerations of humanity, of policy, and of constitutional power. But a spirit of liberality may even now tolerate an honest difference of opinion on such a subject; and it should be the part of the wise and the good to pour oil over this angry sea—to endeavour to calm the passions which were excited by the discussion, rather than to revive the remembrance of so painful a controversy by seeking to arraign the motives of those who were engaged in it. Whatever difference of opinion may still exist as to the part which Mr. Pinkney took in this question, or of the manner in which the controversy was conducted on his side, all

will now, I should think, concur in the sentiment expressed by him at the close of his speech in the Senate on that memorable occasion. After alluding to the ambitious motives which were imputed to some who were engaged in the controversy, he added: "For myself I can truly say that I am wholly destitute of what is commonly called Ambition. It is said that Ambition is the disease of noble minds. If it be so, mine must be a vulgar one: For I have nothing to desire in this world but professional fame,—health and competence for those who are dear to me, a long list of friends among the virtuous and the good, and honour and prosperity for my country. But if I possessed any faculties by the exertion of which at a moment like the present I could gain a place in the affectionate remembrance of my countrymen, and connect my humble name with the stability of the American Union by tranquilizing the alarms which are now believed to endanger it, I know of no reward on this side the grave, save only that of an approving conscience, which, put in comparison with it, I should think worthy of a sigh, if lost,—of exultation, if obtained."

PART SECOND.

I meditate with exultation,
not fear, upon the proud spectacle
of a peaceful judicial sorrow ~~upon~~
inflicting sorrows claims, and rapidly
passage by this more I see in
Amphictyonic Council: —
it is pride of the immortality of
the Union, of ~~the~~ a perpetuity of
rational strength and glory arising
and brightening with age of concord
at home and abroad.

Nº. I.

**MR. PINKNEY'S OPINIONS DELIVERED AT THE BOARD
OF COMMISSIONERS, ACTING UNDER THE 7TH AR-
TICLE OF THE TREATY OF 1794, BETWEEN THE
UNITED STATES AND GREAT BRITAIN.**

THE BETSEY,

FURLONG, *Master.*

DR. NICHOLL.—"The board having maturely considered the Memorial and Exhibits, together with the letter of Mr. Gosling, and it being proposed and agreed that the board should now come to a decision on the following question: 'Whether on behalf of the claimant, a case has been made out which comes within the provisions of the treaty?' Dr. Nicholl stated as his opinion, that the sentence of condemnation having been affirmed in this case, upon an appeal to the supreme tribunal, credit is to be given to it, inasmuch as, according to the general law of nations, it is presumed that justice has been administered in matters of prize by the supreme tribunal of the capturing state.

"That the treaty has not altered this general rule of the law of nations, having engaged to afford relief only in cases (either existing at the time of signing or arising before the ratifications) in which, from circumstances belonging to them, adequate compensation could not then be obtained in the ordinary course of justice, or in other words, (but no words can be more explicit and clear than those of the treaty itself) cases to which circumstances belonged that rendered the powers of the Supreme Court of this country, acting according to its ordinary rules, incompetent to afford complete compensation.

"That the appeal was heard after the signing of the treaty, and the claimant has not satisfactorily shown any circumstances, belonging to his case, on account of which adequate compensation could not have been obtained in the ordinary course of judicial proceedings; or on account of which the supreme tribunal could not fully consider, and justly decide upon the whole merits of the case.

"Dr. Nicholl therefore thought that the claim ought to be dismissed, (Signed) JOHN NICHOLL.

January 30th, 1797.

"Enlarged opinion by

Dr. NICHOLL. "Several members of the board have recorded their opinions, not only on the preliminary question which arose in this case, as to the construction of the treaty, but also on the merits of the claimant's demand of compensation. They have not only recorded the general grounds of their opinions, but have discussed at length several of the topics that were either contained in the printed cases and other proceedings, or mentioned at the board in the course of the inquiry.—Lest from this latter circumstance it should be inferred that those topics formed the principal grounds of my decision, I feel myself called upon to state in writing the reasons of my ultimate opinion on the merits of the case.

"At the same time, I take the opportunity of declaring that it is not my present intention again to resort to this measure, not thinking that the duty I have undertaken calls for it.

"Upon the construction of the treaty as to the extent of the powers given to the commissioners, it might be questioned how far the decision of the board was binding on the high contracting parties. The decision might be revised, and the reasons of each member might be required to appear. I therefore record mine. But upon the merits of the claims and the amount of compensation, the treaty has expressly declared the decision of the majority of the board to be final and conclusive.

"It would be extremely inconvenient, if not altogether incompatible with my professional engagements, to state my opinion in writing on the merits of each case.

" It is probable that those who shall chance to read the reasons which may be hereafter recorded in other cases by members of the board, and who shall find certain positions very ably controverted in those reasons, may infer that a difference of opinion in other members was wholly or principally founded on those positions, notwithstanding in truth they might not materially, or even in any degree, weigh in their final judgment. I must submit in future cases to be exposed to such erroneous inferences.

" In what I am about to state, it is not my intention to combat any of the positions laid down in the opinions in writing delivered in by other members, however decided my dissent may be from several of them: much less shall I examine any loose observations in the printed cases or proceedings, or which may have dropped at the board in the course of an unreserved discussion of the merits of the claim. I shall content myself with stating briefly what was my own final impression of the case, leaving undisturbed those reasons which have governed other gentlemen in their decision.

" It appears unnecessary again to state minutely the circumstances of the case. They will be found in the proceedings, and in the opinions of other members.

" The first and principal consideration is in respect to the compensation claimed on behalf of George Patterson, the proprietor of the vessel, and of a moiety of the cargo.

" George Patterson was a citizen of America. He went on board the Betsey to the French Island of Guadaloupe several months after the existence of open war between Great Britain and France, disposed of her cargo there, dispatched the vessel to America with the (present) return cargo, and with instructions to bring back another cargo to Guadaloupe.

" George Patterson remained behind at Guadaloupe, and was resident there at the time of the capture in question.

" All persons who are within the enemy's territory, are, *prima facie*, to be considered as enemies, and are liable to hostility.

" But a person within the enemy's territory is excepted from hostility, if it can be shown that he was a neutral, and was there for an occasional purpose, and not engaged in any transactions connected with the operations of war. A neutral must cautious-

entering into other reasons) that at least there was *probable cause* for putting the matter into a course of judicial inquiry, and that the demand of compensation for all losses and damages resulting from the capture is wholly unfounded.

“ The last matter of any material importance to be considered, is the demand made not only for the loss and damage actually incurred, and out of pocket, but also for loss of the profit that might have been made if the cargo had arrived and been sold at its port of destination.

“ The claimants in making this demand appear to me to have forgotten, that if neutrals are to enjoy the benefits arising from a state of war, they must be content to bear part of its inconveniencies; or on the other hand, if they claim to be exonerated from all the risks and inconveniencies of war, they must agree to forego its advantages. They are not to say, give to my commerce the security of the state of peace, but give me the profits of the state of war. The risk and the profits are the counterpoise to each other.

“ A claim is here made of a profit of near an hundred per cent. This is scarcely ever heard of in time of peace. If it existed at all, it existed only in consequence of the war, and the risks that usually accompany it.

“ To reimburse the claimants the original cost of their property, and all the expenses they have actually incurred, together with interest on the whole amount, would, I think, be a just and adequate compensation. This, I believe, is the measure of compensation usually made by all belligerent nations, and accepted by all neutral nations, for losses, costs, and damages occasioned by illegal captures.

“ To add to the original cost of the property a reasonable mercantile profit, such as is usually made in time of peace, would, in my opinion, amount even to a very liberal compensation.

“ But the demand that is set up of the profits that might possibly have been made, if the cargo had arrived and been sold at its destined port, when it is recollected that the trade itself was barely not-illegal, it being opened by the enemy to the neutral, in a great measure, under the pressure of war—that the profits of this trade were highly inflamed by the war; the French West-India colonists being under a necessity of selling their produce

at a very low price to neutrals, who conveyed it circuitously to Europe; and the prices in Europe from the same causes being very high; that the prices were further raised in America at the period in question, by the general order that had existed to stop all American vessels engaged in that trade—when it is further recollected that the prices at Baltimore were probably increased by the capture of several vessels destined to that port; and in some degree by the capture of this very vessel, (for it would be almost monstrous to insist that in making compensation for these captures, the inflated price occasioned by the very captures themselves, is to be paid,) added to this, the extreme difficulty of ascertaining the amount of these profits, under all the risks, with any degree of rational certainty. Under all these circumstances, the demand, I say, of these war profits, at the same time that the British government is about to compensate the citizens of America for all the actual losses resulting at this period from the state of war, and to indemnify them by a new and extraordinary mode of relief, from those costs and damages which other nations are content to seek only in the ordinary course of justice, appears to me highly unreasonable. It is a demand that, in my opinion, is not consistent with the true meaning of the treaty itself, which intended to substitute in this respect a new mode, and not a new measure of compensation. It is a demand not supported by that reciprocity—by that maxim of taking advantage and disadvantage together, which is the very foundation and spirit of equity, justice, and the law of nations.”

MR. PINKNEY.—A leading feature of this case is, that the sentence of condemnation in the Vice-Admiralty of Bermuda, has, upon the appeal of the claimant been affirmed by the Lords Commissioners for Appeals, the supreme judicature in the kingdom in matters of prize.

In consequence, a question has occurred upon the showing of the agent of the crown, “Whether this Board is bound and concluded by that

“affirmance, so as to be prevented (as between
 “the claimants and his Majesty’s government)
 “from examining into and relieving against the
 “capture and condemnation, sanctioned by it as
 “between the claimants and the captor, upon
 “the same evidence in substance submitted to the
 “consideration of their Lordships?”

The agent’s objection is in the following words,
 “That the captor has no right against the claim-
 “ants to found a condemnation but as a *grantee*
 “*of the crown*, and such as the crown would have
 “had in the same circumstances; and that, there-
 “fore, this is a case between the *same parties*,
 “and upon the *same facts* in which a judgment
 “has been given in a solemn decision by the Su-
 “preme Court of the law of nations in this king-
 “dom, which other authorities, proceeding by
 “the same law, are bound to respect and con-
 “firm;—that the case has no circumstances be-
 “longing to it, by which the claimants were dis-
 “abled from receiving complete justice in the ordi-
 “nary course of judicial proceedings, and, there-
 “fore, that it is not a case in which the parties
 “are entitled to relief under and by virtue of the
 “provisions of the treaty.”

Upon the fullest consideration of this objec-
 tion, I have stated it to be my opinion, “that the
 “affirmance of the condemnation by the Lords
 “does, in no respect, bind us as Commissioners
 “under the 7th article of the treaty; and that it
 “is no further material to our inquiries, in the
 “execution of the trust confided to us, than as it

“ goes to prove that compensation was unattainable by the claimants in the ordinary course of justice.”

It has been explicitly understood that the opinion I have thus delivered is in precise conformity with that of his Majesty's government ; but, as the objection to which it is opposed has been repeated by the agent on every occasion that has since occurred, notwithstanding the avowed disapprobation of its principles by those from whom his authority is derived, and as one of the Board has not only sustained the objection by his ultimate opinion, but recorded the reasons which have induced him to do so, in the nature of a protest against the decision of the majority, I feel it to be my duty to reduce to writing, and to file the reflections which have led me to the foregoing conclusion.

There are some of the agent's premises which I shall not employ myself in contesting. He who alleges, for example, that the *crown* is the same party with the *master or owner of a privateer*, to whom it has granted a commission of reprisals, can expect no more than that his allegation should be merely denied. But even if the allegation were true, there is certainly more novelty than correctness in the argument that a judgment of his Majesty's own Court, composed of the members of his own Council, is the more especially entitled to a conclusive quality against neutral nations and their citizens, who have been injured by it, *because his Majesty was himself a party to the suit.*

I am very far from being disposed to insist that the judgments of the Lords of Appeal is the *less* to be respected on that account : but it is neither indecorous towards that high court, nor unreasonable in itself to say, that the extensive binding force, now for the first time attributed to their sentences, could not rest on a foundation so little calculated to support it.

In order to ascertain whether the sentence of the Lords in this case (however unjust it may be) is conclusive upon this Board *under the treaty*, it is previously to be inquired whether the government of the United States, independent of the treaty, would, upon the application of the claimants for redress against the capture and condemnation confirmed by it, by way of reprisals or otherwise, be bound by the *law of nations* to esteem it just, although upon its face, it was manifestly the reverse.

The necessity of this preliminary inquiry would seem to be obvious at first sight ; but it will, perhaps, be more apparent when I proceed to show the influence which its true result is entitled to have upon the construction of the treaty.

“By the law of nations, universally and immemorially received, the legality of a seizure as prize is to be determined in the courts of the nation to which the captor belongs, judging according to that law, and to treaties (if any) subsisting between the states of the captor and claimant.”

(*Answer to Prussian Memorial.*)

The nature and grounds of this exclusive prize jurisdiction in the nation of the captor, and the legal effects flowing from its exercise, are so clearly detailed by Rutherford, in his Institutes of Natural Law, that I will here quote that detail at large in place of giving my own.

This right of the nation of the captor (says Rutherford, 2d vol. p. 596) is founded upon another, i. e. the right of the nation to inspect into the conduct of the captors, both because they are members of the state, and *because it is answerable to all other states ; for what they do in war is done either under its general or under its special commission.* “ The captors, therefore, (p. “ 597) are obliged, upon account of the jurisdiction which the state has over their persons, to “ bring such ships or goods as they seize on the “ main ocean into their ports : and they cannot “ acquire property in them till the state has determined whether they were lawfully taken or “ not. This right which their own state has to “ determine this matter is so far an *exclusive* one, “ that no other state can claim to judge of their “ behaviour till it has been thoroughly examined “ into by their own : both because no other state “ has jurisdiction over their persons, and likewise “ because no other state is answerable for what “ they do. But the state to which the captors “ belong, whilst it is thus examining into the behaviour of its own members, and deciding whether the ships or goods which they have seized “ upon are lawfully taken or not, is determining

“ a controversy between its own members and the
 “ foreigners who claim the ships or the goods :
 “ and this controversy did not arise within its own
 “ territory, but on the main ocean. The right,
 “ therefore, which it exercises is not *civil juris-*
 “ *diction* ; and the civil law which is peculiar to
 “ its own territory is not the law by which it ought
 “ to proceed ; neither the place where the con-
 “ troversy arose, nor the parties who are con-
 “ cerned, are subject to that law. The only law
 “ by which it can be determined is the *law of na-*
 “ *ture* applied to the collective bodies of civil
 “ societies ; that is, the law of nations, unless in-
 “ deed there have been particular treaties made
 “ between the two states to which the captors and
 “ claimants belong, &c.”

“ This right of the state to which the captors
 “ belong, (p. 598) to judge exclusively, is *not a*
 “ *complete jurisdiction*. The captors, who are its
 “ members, are bound to submit to its sentence,
 “ though this sentence should happen to be er-
 “ roneous, because it has a complete jurisdiction
 “ over their persons. *But the other parties in*
 “ *the controversy*, as they are members of another
 “ state, are only bound to submit to its sentence,
 “ *as far as this sentence is agreeable to the law*
 “ *of nations or to particular treaties*, because it
 “ has no jurisdiction over them, in respect either
 “ of their persons or of the things that are the sub-
 “ ject of the controversy ;—*if justice therefore is*
 “ *not done them, they may apply to their own*
 “ *state for a remedy which may consistently with*

*“ the law of nations, give them a remedy, either
 “ by solemn war, or by reprisals. In order to
 “ determine when their right to apply to their own
 “ state begins, we must inquire when the exclu-
 “ sive right of the other state to judge in this
 “ controversy ends. As this exclusive right is
 “ nothing else but the right of the state to which
 “ the captors belong, to examine into the con-
 “ duct of its own members, before it becomes an-
 “ swerable for what they have done, such exclu-
 “ sive right cannot end until their conduct has
 “ been thoroughly examined. Natural equity will
 “ not allow that the state should be answerable
 “ for their acts, until those acts are examined
 “ by all the ways which the state has appointed
 “ for this purpose. Since, therefore, it is usual in
 “ maritime countries to establish not only infe-
 “ rior courts of marine, to judge what is and what
 “ is not lawful prize ; but likewise superior courts
 “ of review, to which the parties may appeal,
 “ if they think themselves aggrieved by the infe-
 “ rior courts ; the subjects of a neutral state can
 “ have no right to apply to their own state for a
 “ remedy against the erroneous sentence of an in-
 “ ferior, until they have appealed to the superior
 “ court, or to the several superior courts, if there
 “ are more courts of this sort than one, and until the
 “ sentence has been confirmed in all of them. After
 “ the sentence of the inferior courts has been thus
 “ confirmed, (the very case of the Betsey, Fur-
 “ long,) the foreign claimants may apply to their
 “ own state for a remedy if they think themselves*

“aggrieved : but the law of nations will not entitle them to a remedy unless they have been actually aggrieved, and, even if upon their own report they appear in the judgment of their own state to have been actually aggrieved ; yet this will not justify it in declaring war or in making reprisals immediately. When the matter is carried thus far, the two states become the parties in the controversy. And since the law of nature, whether applied to individuals or civil societies, abhors the use of force, until force becomes necessary, the supreme governors of the neutral state, before they proceed to solemn war or to reprisals, ought to apply to the supreme governors of the other state, both to satisfy themselves that they have been rightly informed, and likewise to try whether the controversy cannot be adjusted by more gentle methods.”

From the foregoing quotations it may be collected, that the jurisdiction of the court of the capturing nation is complete *upon the point of property*—that its sentence forecloses all controversy *between claimant and captors, and those claiming under them*—and that it terminates for ever *all ordinary judicial inquiry upon the matter of it*. These are the unquestionable effects of a final admiralty sentence, and in these respects it is unimpeachable and conclusive. But the doctrine involved in Mr. Gosling’s objection reaches infinitely further. It swells an incidental jurisdiction over *things* into a direct, complete,

and unqualified control over nations and their citizens. The author I have just quoted, proves incontestibly, by arguments drawn from the nature and foundation of prize cognizance, that this doctrine is absurd and inadmissible—that neither the United States, nor the claimants its citizens, are bound to take for just the sentence of the Lords, if in fact it is not so ; and that the affirmation of an illegal condemnation, so far from legitimating the wrong done by the original seizure, and precluding the neutral from seeking reparation for it against the British nation, is peculiarly that very act which consummates the wrong, and indisputably perfects the neutral's right of demanding that reparation through the medium of his own government.

If I had no opinion to combat but that of the agent, on a point so extremely plain, I would content myself on this part of the subject with what has been said. But the agent's opinion has derived countenance from a source too respectable to be slighted, and I will, therefore, bestow some further consideration on it.

It results, from the equality and independence of nations, that the jurisdiction entrusted to one nation for wise and equitable purposes, by that law which is common to all, shall not be allowed to encroach upon the rights of other states, or (which is the same thing) those of their citizens or subjects.

The municipal law of every well regulated community, in which the ends of social union, and the moral duties arising out of it, are understood,

will furnish us with the axiom—"sic utere tuo ut alienum non lædas." This axiom, although incorporated into the local code of many countries, belongs to and forms a part of the law of nature; and if such is the rule which natural as well as civil law prescribes to individuals in their social relations, it is not to be conceived that the law of nations, which considers states as so many individuals upon a footing of relative equality, communicates jurisdiction to any, without annexing a condition to the grant, that in its exercise it shall not trench upon the rights of any other member of the great society of nations.

If the largest possible scope be given to the jurisdiction in question, still it is a jurisdiction which must be *rightfully* used by the state that claims it. The law of nations cannot be supposed to give to one state the right of invading, under judicial forms, the property of another. The power it does give is that of examining and justly deciding (directly upon the conduct of its own members) and (incidentally) upon the rights of neutrals, in matters of prize; but it would be a libel upon the law of nations to say, that a decision *contrary to justice*, against those who are equal to, and independent of, the court pronouncing it, is warranted by any jurisdiction known to that law. Such a decision, it may confidently be urged, has and can have nothing but physical power to sustain it. However it may be pronounced *under colour of* an existing authority, it can never be by *virtue of it*.

The law of nations, which is a system of moral equity applied to civil societies, respects, and is calculated to shield from infringement, the rights of all, without preference to any. If it recognizes and protects the right of a belligerent to determine the question of prize or no prize, according to the rules it has ordained, it also acknowledges and protects the right of a neutral to his merchandise and vessels not confiscable by those rules. And if the former right is abused or exceeded (from error or design) to the manifest violation of the latter, that law which has both *equally* under its protection, will vindicate the right so violated, by entitling the party injured to redress.

The most strenuous advocate for the omnipotence of prize jurisdiction, would hardly venture to advance so bold an absurdity as that the law of nations confers an unlimited discretion upon those who act under it. On the contrary, it is universally agreed (vid. Lee on Captures, 238—Ansr. to Prussian Memorial, 2—Ruth. ubi sup. &c. &c.) that the use of the jurisdiction is regulated and bounded by the law which grants it. Who does not see, then, that if it is used contrary to the regulations, or stretched beyond those limits, such use is *wrongful* in respect of the neutral nation, and its citizens affected by its operation? And if it be wrongful, how can it be maintained that the neutral nation and its injured citizens are remediless? But if admiralty decrees are to carry along with them incontrovertible evidence of their own

legality ; if they are to be sheltered by a veil of imaginary sanctity, from all scrutiny or examination into their merits—if they are to pass upon the world for just, although palpably oppressive, it is in vain that the law of nations has circumscribed prize cognizance, and laid down rules of conduct for those to whom it is committed ! No sophistry can establish this position, that although a flagrant wrong has been done by one nation to another, under the pretext of the law of nations, that very law prohibits retribution ; or, that an injurious act becomes to all effectual purposes a lawful one, for no other reason but because it has been done.

The only ground upon which admiralty jurisdiction ever has been or can be rested, shows that a sentence under it, is not to be conclusively taken to be legal. A belligerent has this jurisdiction for its own safety—*because it is answerable to other nations for the conduct of its captors.*

It is allowed exclusive cognizance of the capture, for the purpose of ascertaining whether it will confirm it, and thus complete its own responsibility, or give to the claimant adequate redress against the captor, and thus exonerate itself. Until it has made this ascertainment (provided it is not delayed) the neutral has not in general* any

* I say in *general*, because there may be cases where the nation may be answerable immediately, or at least before the cause has gone through every possible stage,—as where the capture is under the special orders of the state, &c.

cause of complaint against the *belligerent nation*. The national liability is suspended while the subject is regularly *sub judice* between captor and claimant, because it is yet undecided whether the state will adopt the injury, and convert it from a private to a public one.

The judgment of its Prize Court, in the last resort, in general, perfects or destroys that liability. If it grants adequate redress, there is nothing to be answerable for; but if, instead of doing so, it completes the original injury by rendering it irreparable by any ordinary means, the national responsibility is obviously perfect. The injury becomes its own; and the neutral, from being compelled to ask redress against the *captor*, is now authorised to ask it against *his nation*, which has sheltered him from his just demands.*

Grotius, b. 3, ch. 2, sec. 5, (treating of reprisals) states expressly that a judicial sentence plainly *against right* to the prejudice of a foreigner, entitles his nation to obtain reparation by reprisals; "*for the authority of the judge is not of the same force against strangers as subjects*. Here is the difference: subjects are bound up by the sentence of the Judge, though it be unjust, so as they cannot oppose the execution of it lawfully, nor by force recover their own right, for the efficacy of that power under which they live:—

* Vide Grotius, Lib. 2, ch. 21. sect. 1, 2, and 8; and 2 Ruth. Inst. Nat. Law, p. 515.

“ But *strangers* have coercive power” (i. e. reprisals of which the author is treating) “ though it be not lawful to use it, *whilst they may recover their right in a judicial way.*”

So that Grotius agrees with Rutherford that the nation of the captor is so far from being discharged of its responsibility for a wrong committed by him, by means of a definitive decree of its prize tribunal denying justice to the neutral claimant, that this very circumstance consummates that responsibility, and he opposes himself unequivocally to the novel doctrine that the Courts of Marine of this or any other country can bind strangers to receive their sentences as indisputably legal, when they are in truth otherwise.

The same principles will be found in Lee on Captures, (treating of reprisals) and in Vattel on the same subject. It is doubtless true that the law of nations prescribes to states reciprocal *respect* for the maritime jurisdictions of each other, and for the sentences flowing from them. It is necessary to their repose that they should not encourage or act upon captious complaints against such sentences. But there is no law, nor can a shadow of authority be produced, to prove that there is, which prescribes to states *implicit submission* to them, when well-grounded complaints are made against them. On the contrary, it is, under such circumstances, the duty of the state whose citizens are oppressed to seek reparation for the damages produced by them. It is self-evident that a belligerent has not, by the law of

nations, the power of adjudging away the property of neutrals not liable to condemnation. But a belligerent has this colossal power in its utmost size, if the decrees of its Prize Courts are in every view to be irrefragable testimony of their justice. How is the want of right to pass a decree by which a neutral has been injured to be established, if that very decree is admitted to prove undeniably that the right existed? How is oppression to be shown or redressed, if that which constitutes its essence, and gives to it, its character and quality, is precisely that which legitimates and shields it from investigation? A *final, unjust judgment* against a neutral, says the law of nations, is a good ground for reprisals, because no other mode of compensation is left. But Mr. Gosling informs us that the ground of reprisals is annihilated in the moment of its birth; for, that as soon as the unjust judgment is passed, the law of nations presumes that it is a lawful judgment, and forbids all the world to doubt or question it!

It is obvious that between independent states, none of which can have authority over the others, one cannot assume to itself an exclusive power of interpreting the law of nations to the prejudice of the rest. So long as the interpretation put upon that law is a proper one, and works no injury to any other state or its citizens, all are under a moral obligation to acquiesce in it, because all are bound by the rule itself; but surely if the rule is misconceived, or if rules unknown

to the law of nations are attempted to be introduced by one nation to the detriment of another, the independence of nations is a term without a meaning, if this is to be submitted to.

To administer the law of nations is the acknowledged province of a Prize Court; and, while acting within this province, (which can only appear from its decrees,) none are authorized to complain of it; but, when it occupies itself in administering some other law by which the society of nations is not bound, it is out of its province, and has no claim to the acquiescence of those whom its sentences may prejudice. If it be true that the definitive decree of a Prize Court, though contrary to the law of nations, binds the nation of the claimant to admit the propriety of its principles, as well as forecloses judicial controversy, the court so decreeing has *legislated* pro hac vice, not adjudged. For the decree introduces a new law for the case, and does not execute that which already exists. What more can be said of a law than that it has a title to implicit submission, and creates the rules which it enforces? That a Prize Court, whether inferior or superior, of any one nation, has this extravagant authority of legislating, in the shape of admiralty sentences as opportunities occur, so as to bind the independent nations of the universe, is a proposition so monstrous, that to be rejected it needs only to be stated.

One of Grotius's commentators, speaking of his idea of a positive law of nations; remarks,

“ that the want of a voluntary union amongst the
 “ several nations of the world, is the reason why
 “ there is in this great society no *legislative pow-*
 “ *er.*” (2 Ruth. 463.)

He was not aware of the boundless effect of admiralty sentences—or, instead of being able to find no legislative authority among nations, he would have discovered it to reside in every superior Prize Court in Europe, under the semblance of judiciary power.

In short, Mr. Gosling's position turns upon a total misconception of the true principle applicable to this question. The definitive sentence of an admiralty court is conclusive upon the subject of it, so as to justify the captor, establish his property, and divest that of the claimant. In reference to ordinary judicatures, the matter of such a sentence can never be drawn *ad aliud examen*. So far is true—but while in this view it operates conclusively by the common consent of mankind, and from the nature of the thing, it leaves open, or rather begets, the question of injury and claim to compensation as between the nations of captor and claimant; the final quality of the sentence, *in one respect*, is the best reason why it should not be so *in the other*. It is by that final quality that the claimant's hopes of ordinary retribution are destroyed—it is that final quality that protects the captor from the just demands of the claimant—and it is that which completely transfers the original wrong from the captor to his government, who, by sheltering him through the

instrumentality of an unquestionable judgment from all individual responsibility, takes his act upon itself, and shows its intention of standing the consequences. Can it be imagined that the belligerent is relieved from its liability for the irregular behaviour of its commissioned cruizers, because it has done that which renders this liability the only instrument of reparation? Can it be believed that it exonerates itself from the obligation to repair eventually the wrong sustained by a neutral from its fleets and privateers, merely by refusing to compel compensation from the wrong doers?

Among all the principles ever attempted to be established in former times, to the ruin of neutral commerce, and the introduction of lawless plunder upon the ocean, none can be selected that equals this. If once it shall be admitted that an admiralty sentence *must* be received as just, however it may be in fact, there is no species of depredation to which neutrals may not be subjected. The memoirs of France and the placart of Holland, may be revived and executed in their utmost rigour without danger of reprisals: since, if confirmed by admiralty sentences, their effects are not to be murmured against! Constructive blockades may be set up without limit, for admiralty sentences can legalize them! I do not mean to intimate that such *would be* the conduct of this or any other government in particular. It is enough that such *may be*, (although we know that such *has been*) the conduct of maritime states; and I

am at liberty to argue against a principle from its possible pernicious consequences. Heretofore it has been supposed that this sort of conduct found its only warrant in *physical power* ; but the new principle, that admiralty sentences can justify every thing by an *ex post facto* purification, will, if it shall be adopted, place it upon the basis of *moral right* ; or, in other words, it is a contrivance to make the law of nations uphold and justify *the violation of its own rules*.

The law of nations is differently understood in different countries. In most countries the instructions of the sovereign are held to be the law of its admiralties, without reference to their coincidence with the law of nations. War has in general produced such instructions, and they have not always been conformable to the only law by which Prize Courts *ought* to determine. A neutral nation, however, has a perfect right to have the claims of its citizens in matters of prize decided according to the law of nations, let the instructions of the belligerent government be what they may ; but this right never has been, and never will be, regarded by maritime jurisdictions, whatever we may be told to the contrary. It follows, that the rights of neutrals are often sacrificed ; but, being sacrificed by *admiralty sentences*, acting upon the instructions of the government, there can be no remedy for the neutrals, if these sentences, though notoriously founded on instructions at variance with the law of nations, are to be conclusively presumed to be in exact conformity with that law.

Thus, although the instructions were unlawful, and the seizure under them equally so;—although the condemnation was evidently unjust, and the affirmance in the last resort (of course) no better; although by this illegal series the neutral was oppressed, and the rights of his nation violated in his own—the affirmance in the last resort, by a retrospection peculiarly operative, sanctioned the whole transaction; thus beginning, progressing and ending in wrong, and by accumulating one injury upon several others, left no injury remaining!

Without going into further detail on this part of the subject, (upon which I have already said more than I believe to be necessary) it may, I think, be safely concluded that the sentence of the Lords did not, and cannot, bind the neutral claimants or their nation to deem it just; but that, on the contrary, if in truth it was otherwise, that sentence was the unequivocal perfection of the original injury produced by irregular or illegal capture, and gave to the claimants and their nation a complete right by the law of nations to seek reparation for the loss and damage resulting from such capture against the government of Great Britain.

Independent of the treaty, such unquestionably would have been the law. It is now to be seen how far the establishment of this conclusion is entitled to influence the construction of the treaty, with a view to the case before us.

The preamble of the 7th article sets forth a complaint on the part of divers American citizens,

“that during the course of the war in which his Majesty was then engaged, they had sustained considerable losses and damages by reason of irregular and illegal captures or condemnations of their vessels and other property, under colour of *authority or commissions from his Majesty* ;” and “that from various circumstances belonging to the said cases, *adequate compensation for the said losses and damages could not then be actually obtained had and received, by the ordinary course of judicial proceedings.*”

Such were the grievances existing, or supposed to exist, at the time of making the treaty. for the reparation of which the British government was ultimately answerable by the *law of nations*, as has been already shown. Upon the principles above stated, however, it is apparent, that, generally speaking, the responsibility of the British government to the American claimant was, at the time of making the treaty, (even supposing his complaint to be well-founded in regard to the capture or condemnation) incomplete.

It did not then appear that justice was unattainable by the claimant against the *captor* through the Lords of Appeal, since at that time the Lords had decided nothing. The law of nations declares, that before the neutral shall have any demand against the captor's government, he shall endeavour to obtain redress against the *captor himself* by all the judicial means in his power. At the time of making the treaty such endeavours had not been used by the American

claimants to the extent required, for the most forward of their cases were still *sub judice*. There had been *no denial of right* (in the language of Grotius) by the Lords of Appeal. The sentences of the inferior courts had not (in the language of Rutherford) been in any instance *confirmed*, or in any shape acted upon by the superior. There had not been even an unreasonable *delay of justice* against the captor. It follows that the American government was not authorized to demand from the British government *immediate and unconditional* compensation for the captures or condemnations of, which its citizens complained; since (even supposing them to be irregular or illegal, as alleged) it was yet to be known *whether the claimants could or could not procure indemnification against the captors in the ordinary course of justice*; and this could only be known, in cases where there were responsible captors, by the direct or analogous determinations of the Lords of Appeal. The framers of the treaty were to adapt their stipulations to a state of things which had not yet arrived, but which it supposes, and upon which it was to operate. They were to adapt it, in a word, to the rights of the one party and the eventual obligations of the other. They do not provide, therefore, "that for the losses and damages arising from the irregular or illegal captures or condemnations complained of, the British government will, at all events, make compensation;" but they provide as follows: "that in all such cases, *where adequate com-*

“compensation cannot, for whatever reason, be now actually obtained, had and received by the said merchants and others in the ordinary course of justice, full and complete compensation for the same will be made by the British government to the said complainants.”

The treaty was made before events had paved the way for its immediate effect. It takes up the subject of national redress by anticipation. It states the ingredients necessary to constitute a valid demand under it, although all the requisite ingredients did not, and could not, then exist. It imposes it upon the claimants as a duty to seek redress against the individual wrong-doer by all competent ordinary means, the result of which could not then be foreseen; and it is upon the eventual failure of such means, without any laches on his part, that it authorizes him to seek reparation from the government of Great Britain. Such a provision, if I comprehend it rightly, is precisely what the law of nations would dictate, and is framed in the very spirit of that law. The eminent negociators who adjusted it seem to have had in their view not only the substance but the *words* of what is said by Grotius in a passage before cited, that the neutral has no claim to compensation from the state to which the wrong-doer belongs, *“whilst he may recover his right in a judicial way.”*

Those who place a different interpretation upon the treaty, say “that it refers to cases to which *“circumstances belonged, that rendered the pow-*

*“er of the Supreme Court of this country, acting according to its ordinary rules, incompetent to afford complete compensation.”**

So far as this construction professes to stand upon the spirit of the treaty, or to execute the probable views of the contracting parties, I oppose to it the consideration that it stops short of such an engagement on the part of Great Britain as the law of nations would prescribe.

That law does not measure the responsibility of a belligerent for illegal captures, as prize, merely by the powers which it chooses to vest in

* The cases admitted to come within this interpretation are, so far as I have been able to collect, as follows :

In cases of seizure, under the revoked orders of council, the Lords have held, that they are bound, upon a reversal of the condemnation, to consider the captor as so far justified by them, as to be excused from costs and damages. In such cases, therefore, it is supposed that the commissioners have, with a view to those costs and damages, power to award them against the British government.

Where restitution is decreed after a sale, the Lords are bound by the Prize Act to give no more than the nett proceeds, and if these proceeds should be short of adequate compensation, it is supposed that we have the power to award the deficiency against the British government, since the Lords were incompetent by an act of parliament to award it against the captor.

Where the captor, become insolvent, so as that the claimant cannot procure payment of a decree of restitution, &c. without any fault on his part, we are supposed to have jurisdiction.

Where any fact other than the claimant's negligence has disabled the Lords from entertaining an appeal, we are supposed to have jurisdiction. I have not heard of any specific cases under this head.

its tribunals, or the checks it thinks proper to impose upon those powers. It measures it also by the legality or the illegality of their decisions, compared with the law of nations, where their powers are confessedly commensurate with the purposes of justice. According to that law, as I have shown above, an illegal sentence by the Lords, confirmatory of an illegal capture to the prejudice of a neutral, is a *national wrong*; for which the British government is to make amends. In every correct idea of the subject, *the act of the court is the act of the nation*. The seizure upon which it operates, was an act for which the state was accountable in default of judicial retribution. The judgment of the Lords shuts up every avenue to such retribution, and of course makes the nation answerable definitively, instead of removing or lessening its precedent liability.

The revoked orders of council, under which many American vessels were captured contrary to the law of nations, and which are held to bind the Lords to excuse the captor from costs and damages, or the act of parliament compelling the Lords to grant only the nett proceeds upon a decree of restitution, were no more *national acts*, for the injurious effects of which the government was to be charged, than the misuser of its prize jurisdiction, by those to whom it has entrusted it, in confirming a capture which the law of nations condemns. The state is as much chargeable for the infringement of neutral rights by the council in its *judiciary character*, as by the same council

in its *executive*, or any other character. It can only result from a misconception of the subject, that we should attach national responsibility to the latter, and yet exempt the former from all obligations to recompense. If there is a national authority (and it is admitted there is) for the exercise of which a state is answerable to foreign powers, and their members, it is peculiarly that which the law of nations, and not civil institution, has communicated.

Territorial jurisdiction, more immediately belongs to the government that claims it. It is more absolute and exclusive, because it is founded upon the domain of the society within which it is exerted, and springs from their common will, and theirs only.

But prize cognizance has its basis in the law, which all states have an equal interest in, and to which all are parties. Its objects are the rights of all—its essential principle the equity of all. It is admitted that the British government is responsible, not only by the law of nations, but even under the 7th article of the treaty, for the losses sustained by citizens of the United States, by reason of an *act of the British parliament*, which makes the net proceeds, in prize causes, the measure of restitution, even after the rule established by that act has been judicially sanctioned.

If there is any difference between the power of legislation vested in the parliament of Great Britain, and the judiciary power vested in its

Courts of Prize, with a view to plenitude or exclusiveness, we can be at no loss to discover on which side the difference lies. Can it be thought that, if the former power, sovereign, pre-eminent, and completely exclusive as it unquestionably is, cannot justify the violation of neutral rights,—the latter, deriving its existence from the general law which belongs to civil societies, and founded upon their relative independence, is thus omnipotent? It is inconceivable, that while the British nation is answerable for wrongs produced by the acts of its constitutional legislature, even after they have received the sanction of Admiralty decrees; the acts of its Prize Courts, having no warrant in any law whatsoever, can be lifted above the reach of inquiry or exception. And here it is proper to notice a suggestion, which we have heard more than once deliberately repeated, that it is highly improbable that Great Britain would consent that the decrees of its highest Court of Prize should be brought into question. Without stating the particular manner in which this improbability has been inferred, it may be sufficient to observe, that, if the suggestion is grounded upon any supposed right on the part of Great Britain to insist on the conclusive nature of such decrees, we have already seen that, however such a right may be *supposed*, it does not in truth exist. If it be rested on any other ground, it may be answered, that Great Britain has consented to submit the justice of one of its highest acts of sovereignty (an act of parliament) to our de-

termination—and has also consented to subject to our opinion the propriety of a rule of prize cognizance necessarily flowing from, or rather included in, an order of his Majesty in council, and adopted in practice by the Lords. Can there be any just sense of national pride or respect for national jurisdiction or prerogative, fairly attributable to a great nation, which will allow it to go *thus far* in a scheme of equitable retribution for injuries to a friendly power, produced in the heat of an unprecedented war, and yet induce it to hold up the sentences of its maritime tribunals as defying impeachment, and to exact from all the world a blind and superstitious faith in their legality?

From the foregoing considerations it will be pretty manifest that (unless the words of the treaty necessarily import as much) there is no reason to believe that the framers of that instrument intended to bottom the liability of the British government, in regard to the captures and condemnations complained of in the preamble to the 7th article, *upon any specific want of power in its Supreme Court of Prize to grant complete compensation*; but on the contrary, that it ought to be presumed (if the words of the article will bear us out in it) that they intended to provide for and effectuate that more extended and rational responsibility which the law of nations indicates.

When we are acquainted with the measure of redress which the neutral had a right to demand,

and the belligerent was under every obligation to assent to, it does not seem reasonable to *infer* that the treaty was meant to fail of giving full effect to them. An interpretation of an instrument of redress between nations which cannot be referred to any conceivable estimate of the rights of the party seeking, or the moral duties of the party conceding the redress, cannot lay claim to attention upon any other footing than that it arises *unavoidably* from the positive and restrictive language of the stipulation. An interpretation of such an instrument, which precisely quadrates with the reciprocal rights and obligations of the parties to it, is such a one as must be received, and will be received, by the common sense of mankind, if it can be sustained *without violence to the letter of the contract*.

It is said by Rutherford and other respectable jurists, "that even where words are capable of *two senses*, either of which will produce some effect, you shall take that sense which is reasonable and consistent *with that law which applied to the subject*;" and again, "that where nothing appears to the contrary, the *presumption is that the parties meant what they ought to mean*." (2 Ruth. Inst. Natl. Law, p. 326, 7.)

It is in this view that I have supposed it to be important to ascertain by a preliminary inquiry that neither the United States, nor the claimants, their citizens, were bound to receive as just the sentences of the Lords, unless they were so in fact—that such sentences if unjust, instead of

shaking off the responsibility of the British nation for the losses and damages resulting from illegal captures and condemnations, produced the perfection of that responsibility, and gave to the United States an indisputable right, by the law of nations, to require of the British government, in behalf of its citizens, adequate compensation for those losses and damages. It will now follow that, even if the words of the 7th article will admit of two constructions, one of which shall be agreeable to the foregoing result, and the other to the opinion of the agent, it is our duty to adopt the former. And it will now be in our power to estimate more accurately the import of every efficient term in the article.

The truth is, that without forcing upon the language of the clause a meaning not to be found in it, the agent's position cannot be countenanced by it: while on the other hand, that construction which suits, as I have shown, the nature of the subject regulated by the article, is such as the language of it would lead us to adopt.

Let us now proceed to an examination of the *letter* of the article.

I have already quoted the preamble, from which it appears that the allegation recited in it *has* a two-fold aspect.

1st. That American citizens had sustained considerable losses and damages by reason of irregular or illegal captures or condemnations under colour, &c.

2d. That from various circumstances belonging to their cases, adequate compensation *could not* then be actually obtained, had and received by the ordinary course of judicial proceedings.

The provision itself stipulates that in all such cases where adequate compensation for the said losses and damages *cannot for whatever reason* be now actually obtained, had and received, *by the said merchants and others*, in the ordinary course of justice, full and complete compensation for the same will be made by the British government, to the said complainants, with a proviso that the stipulation shall not extend to such losses and damages as have been occasioned by the manifest delay, or negligence, or wilful omission of the claimants.

Upon language so clear and definite, it is not easy to make comments with any view to further perspicuity. I will make the attempt however. We are to have jurisdiction, if it shall appear that the claimants *could not*, at the time of making the treaty, *for any reason whatsoever*, (other than their own laches,) actually obtain, have and receive adequate compensation, in the ordinary course of justice.

The claimants in the case before the Board have alleged and proved that they have made *a complete experiment* on this subject; they have alleged and proved that they have had recourse to the only tribunal competent to give them any redress in the ordinary course of justice, and that tribunal, after a full examination of their case, has,

upon the special circumstance of it, absolutely and conclusively denied them any compensation whatsoever, without any delay or negligence, &c. on the part of the claimants. Of the practicability or impracticability of obtaining judicial redress in any given case, one would think that no evidence could be so eminently satisfactory and appropriate as the result of a fair and complete attempt to obtain it, in the only possible way in which it was to be obtained; if obtainable at all. It is not pretended on this occasion that the attempt was *defectively made*, or that its result is in any sort ascribable to the laches of the parties making it. It must be allowed on all hands, then, to have flowed from the *circumstances belonging to the case* upon which the Lords of Appeal have pronounced a final decision. Indeed the decree of the Lords expressly says so. We have not heard it suggested that any expedient was open to the claimants by which they could have produced a different result, or, in other words, by which they *could have* obtained judicially the redress to which they say they are entitled—and it is certain that the sentence of the Lords has closed the subject, in a judicial view, for ever. If the claimants could have obtained adequate compensation in the usual course of justice, it is natural to ask how does it happen that they have not obtained it? Have they not made every practicable effort towards that end? Nobody denies it. Has not all compensation been definitively refused them upon the facts attending their complaint? We all agree

to this. It is of course sufficiently proved that the claimants could not obtain judicial retribution. But it is said that this is not enough to gratify the treaty. I will at present take for granted, however, that it gratifies the term *cannot*—and, if it does, it will be difficult to point out any other words in the article which it does not gratify. It is contended that it must appear farther *that the claimants could not obtain adequate compensation on account of the want of power in the Lords of Appeal, acting according to their ordinary rules to afford it.* Although this idea is obviously short of what the contracting parties ought to have meant, and cannot be reconciled with *the law applicable to the subject, of the article*, yet if the language of it inevitably pointed to so inadequate a conception of its views, I should hold it to be my duty to adopt it. I have, therefore, searched in the article for the restrictive specification which confines the impracticability of obtaining judicial redress to that sort only which could be referred to nothing but the incompetency of the powers of the Lords of Appeal. Upon examining the stipulation, however, which is supposed to contain this specification, or something equivalent to it, I am so far from finding it, that I discover the terms, actually used for the purpose of the definition it aims at, to be of peculiarly extensive import, so wide and comprehensive as to be *universal*, and unclogged by any exception whatsoever, other than the exception of *the manifest delay, &c. of the claimants.*

The language of the preamble is "*from various circumstances belonging to the said cases*:" that of the provision itself is "*for whatever reason*."

If the term "*various circumstances*" can be supposed to mean no more *than circumstances of a particular description affecting the powers of the Lords*; or if the term "*for whatever reason*" can be lessened down so as to mean no more than *for a reason of a precise and peculiar nature*—or if a designation of the largest possible range, evidently inserted to reach universality, can be converted arbitrarily into a designation of the most circumscribed and limited nature—then, indeed, it may be true that the article extends only to cases *to which circumstances belonged that rendered the powers of the Supreme Court of this country, acting according to its ordinary rules, incompetent to afford complete compensation*.

The slightest view of the article will serve to produce conviction that this selection of a particular class of *circumstances or reasons*, to the exclusion of all others, is a fanciful selection, not authorized by the article itself. The article does not prescribe to the claimants the precise indication of any *circumstances or reasons* producing the failure of the judicial remedy. It is enough, unless we put into the clause what is not there at present, that it is palpably seen that some *circumstances or reasons*, other than the claimant's neglect, produced that failure; and of this the sentence, dismissing the appeal upon the merits, must

be undeniable testimony—although neither the sentence nor the prior proceedings may enable us to identify the special fact or reason which stood between the claimants and the compensation they demanded.

In the case before the Board, the Lords have stated in their decree that they dismissed the appeal upon *all the special circumstances of the case*. If it were necessary to resort to every mode of illustration upon this question, it might here be observed, that when the Lords have, by a final sentence, assured us that on account of *all the special circumstances* of the claimants' case, judicial redress was refused them—we might venture to conclude, in the language of the preamble to the 7th article, that there were "*various circumstances* belonging to the said case," by reason of which the claimants *could not* obtain, have and receive, adequate compensation, by the ordinary course of judicial proceedings. It will hardly be imagined that the term "*various circumstances*," in the preamble of the 7th article of the treaty, is not at least equally as large with "*all the special circumstances*" in the Lords' decree—and it need not be insisted on, that if their lordships had shaped their sentence with studied reference to that article, they could not have framed it more aptly for the purpose of bringing the claim of the memorialists within its pale.

Even if the treaty required it of the memorialists to specify the circumstances which made them incapable of procuring compensation before the

Lords, they are here enabled to comply with this nicety, inasmuch as they have the best warrant for saying that *all the circumstances* of the case concurred to constitute this incapacity. But surely there is no necessity to be thus minute; nor is it on many occasions possible to be so. We know that the miscarriage of the judicial remedy must arise from *some circumstances* belonging to the case from a reason of some description or other, and, if we are satisfied that such *circumstance* or reason was not the *neglect of the claimants*, why are we to scrutinize further, since the treaty declares that it shall be totally immaterial what the *circumstance* or *reason* is, provided it be not such neglect? We can put no other construction upon the words "*for whatever reason*," without resorting to an equitable interpretation, more loose than any example will justify; and if we have recourse to equitable interpretation, such as it ought to be, it has before been demonstrated, that it will only serve more decidedly to indispose us towards the desired restriction.

But stress has been laid upon the word "*cannot*," as if it related to *want of power in the Lords*. And it has been asked, why the contracting parties did not (if my construction of the article is correct) use the words "*shall not*," so as to make the clause read thus—"it is agreed that in all cases where adequate compensation *shall not*, for whatever reason, be actually obtained, had and received, in the ordinary course of justice," &c.

It might be sufficient to say, in answer to this argument, that the word "*cannot*" has not, in itself, any exclusive relation to an impracticability of any particular description, and that when it is conjectured to refer to a defect of authority in the Lords, the conjecture has no foundation in the ordinary meaning of the word. But the argument will admit of another answer more pointedly applicable to the latter branch of it. The words "*cannot now*," appear to have been used in preference to the words suggested, because they would exclude the claimants from compensation where failure of ordinary redress should be *in consequence of their own neglect happening after the making of the treaty*, while at the same time they would completely open the door to compensation, where such failure was not produced by the fault of the claimants. The treaty contemplated national reparation where no other was *within the power of the claimants*, and, consequently, it has said, "where adequate compensation *cannot* be obtained by the said merchants *and others*." If it had said, "where adequate compensation *shall not* be obtained," &c., it would have gone beyond the object I ascribe to it, as well as beyond the responsibility of the British government upon it which it meant to act. If I am told here, that a proviso might have limited and explained this looseness of expression—and in fact there is now such an explanation subjoined to the provision as it stands—I answer that those who are framing a treaty must be supposed

to aim at as accurate a designation of their meaning as possible in that body of the provision they are modelling; and that they are not to be suspected of adopting a phraseology unnecessarily wide of the views, in the hope of being able to correct it by a proviso;—that as to the explanation which now makes a part of the article, it appears to have no effect upon it with a view to any delay or negligence happening after the making of the treaty; for that such, after negligence is guarded against solely by the words “cannot now,” and if not *solely*, it is at least *sufficiently* guarded against by those words.

In short, the terms “*cannot now*” suited views such as I attribute to the makers of the treaty. The words “*shall not*” would have exceeded those views.

It is said to be a rule in literal interpretations to follow that sense which is agreeable to common use, without attending to grammatical fancies or refinements. But surely there is much fancy and refinement, and very little attention to common usage, in construing words which state an impracticability, for *any cause* to mean an impracticability for some special cause. He who says, “that if redress cannot, for *whatev'er reason*, be obtained in the ordinary course of justice, he will himself grant it,” can hardly, without departing from the settled import of the terms, be made to mean merely “that he will grant compensation, if it cannot be obtained on *account of some possible deficiency of power in a certain tribunal*.” If

the treaty had run thus—"Where adequate compensation *cannot be adjudged or afforded by the Lords of Appeal*, in their ordinary course of proceedings," instead of "*where adequate compensation cannot be obtained by the said merchants and others*," there might have been room to argue that the incapacity of the Lords, by reason of the scantiness of their authority, was intended to be relied upon, and not the incapacity of the claimants; the words as they now stand have no reference to the incompetency of the Lords, they point to the *claimants'* want of power to procure retribution, and they declare, moreover, that it shall be of no importance what this want of power arises from, if it be not the precedent negligence of the claimants themselves.

The practicability of obtaining judicial redress for a legal claim is one thing: the practicability of *rendering* it is another. They may depend on causes wholly distinct. If a proper case for relief is brought before a court of competent jurisdiction, it is practicable for that court to relieve; but it may, notwithstanding, be true in regard to the claimant, that relief *cannot be obtained*; for the court may mistake the law, and though *empowered to do justice*, refuse it. The treaty speaks of what can or cannot be *procured by the claimants*, under all the circumstances of their claims, by resorting to their ordinary remedy; and not of what can or cannot be *done by the Lords* in acting upon that ordinary remedy. The first might, indeed, depend in a great degree upon the last;

but it did not *wholly* depend upon it; since the Lords might reject the claimants' demand from *error*, as well as *want of power*. It is plain, therefore, that before the agents' position can be maintained, the terms of the treaty must be radically altered. From a stipulation providing for cases in which the *parties injured* cannot, *for whatever reason, obtain* redress before the Lords, it must be changed into a stipulation providing for cases in which the *Lords* cannot, *for a particular reason, grant redress*. That such a provision cannot, by any admissible mode of construction, be inferred from language which relates exclusively to the power of the *suitor*, and not to that of the tribunal, is too evident for argument.

We can give countenance to this forced inference in no other way than by *fancying* that *both* the contracting parties had such dependence upon the *court of one of them*, as to take it for granted that in all cases where that court had the *power* to do justice, it necessarily followed that it would be procured from it on a proper application. But there is no part of the treaty which makes profession of such unbounded respect for that court, and there is no rule of the law of nations which prescribed such respect to the United States. On the contrary, the American government, by acting upon such an improper dependence on the possible legality of decrees which were yet to be pronounced, would have surrendered by anticipation its indisputable right of questioning those decrees, if in reality they should

be unjust. Why are we to *imagine* that this was contemplated? The treaty does not invite us to this conclusion; and Great Britain had no colour to ask from the United States such a sacrifice. Are we then to uphold an interpretation of this instrument, which is not only unauthorised by its language, but is unsuitable to the subject of it, and at variance with the undoubted rights of one party, and the duties of the other? What Great Britain could not properly demand, we are to suppose she did demand—what the United States ought to have insisted upon, we are to suppose they abandoned; and this is to be done not only without evidence, but in direct contradiction to the declarations of the parties. This is so far from being conformable to the rule cited from Rutherford, that it seems to proceed upon a rule to this effect—“that even where words will fairly admit of but one sense, and that, too, consistent with the law applicable to the subject, we are to force upon them a sense incongruous with that law, and compel the contracting parties to mean what they ought not to have meant.”*

* But even if it were admitted that the parties to the treaty presumed, that where the Lords had power to redress, they would always grant redress, and that they acted upon that presumption, in framing the 7th article—there is a correspondent presumption which it would appear to be our duty to be guided by. I mean the presumption, that where the Lords have not rendered justice, they had not the power to render it—and consequently, that we have the power upon every interpretation of the article. I reject this mode of establishing our jurisdiction, however, because I do not believe that the framers of the treaty acted upon the first presumption.

It is said by Vattel, (b. 2, ch. 17, s. 266,) “ that
 “ on every occasion, when a person has and ought
 “ to have shown his intention, we take for true
 “ against him what he has sufficiently declared.
 “ This is an incontestible principle applied to trea-
 “ ties,” &c.

(Id. ib. sect. 264.) “ If he who who can and
 “ ought to have explained himself clearly and
 “ plainly, has not done it, it is worse for him : *he*
 “ *cannot be allowed to introduce subsequent re-*
 “ *strictions which he has not expressed.*” “ There
 “ can be no secure conventions, no firm and solid
 “ concession, if these may be rendered vain by
 “ subsequent limitations, that ought to have been
 “ mentioned in the piece, if they were included
 “ in the intentions of the contracting powers.”
 Nothing can be plainer than that the limitation
 now attempted to be imposed on the 7th article of
 the treaty, (which, in relation to the subject now
 before us, is the stipulation of Great Britain,) is a
subsequent restriction not expressed in the article it-
 self. The application of the above extracts from
 Vattel is peculiarly strong upon this occasion—
 not only because the language of the 7th article, so
 far from being mysterious and equivocal, clearly op-
 poses itself to the restriction suggested; not only
 because the restriction is inconsistent with every
 just idea of the neutral rights and obligations of
 the contracting parties, and such a one as the
 matter of the contract does not naturally admit;
 but also, because the framers of the article have,
 in the adjustment of its form, evinced their anxie-

ty to guard from a too enlarged construction by an explanation subjoined to the body of the clause, and yet have not added any explanation which gives a colour to this limitation. The concluding part of the first paragraph of the article is satisfactory proof that those who framed it were attentive to the precise effect of their act, and had considered the means of preventing it from being stretched beyond their views. When we thus find the negociators of the treaty employed in weighing the import of the terms in which they had conceived this provision,—when we find them occupied in bounding them by a proviso, so as to fit them with exactness to their object, it is not to be credited that they would have omitted the important limitation which has since occurred to the agent, if, in truth, they intended so to narrow the scope of the clause. Surely if it was meant to assert the infallibility of any particular judicature, in opposition to the words of the provision, an object which is supposed to have been preserved so steadily in the view of one of the parties, would not have been neglected at the time when explicitness upon a subject of infinitely inferior consequence was so cautiously attended to. I forbear to enlarge further on this point, because I wish to avoid unreasonable prolixity; but I think I have already said enough to prove that the objection to our jurisdiction is unfounded.

UPON THE MERITS of this case, a question has occurred, which requires to be examined.

Two of the commissioners have held, that on facts disclosed in the case of George Patterson, the owner of the brig, and part owner of the cargo, was, during and by reason of his stay in Guadeloupe, (an enemy's territory,) liable to be treated as an enemy to Great Britain by those acting under its authority ; and of course, that *his* property sent out from Guadeloupe and seized by a British cruzier, while he remained in that island, was, by the law of nations, rightfully subject to condemnation as prize.

THE FACTS are these—William and George Patterson (the claimants) were citizens of the United States, and partners in trade, resident and carrying on business at Baltimore. The brigantine Betsey was the sole property of George Patterson. She sailed from Baltimore for the West Indies on the 19th December, 1793, with a cargo of flour, butter, and specie, belonging jointly to the said partners. George Patterson sailed in her as owner and supercargo. The vessel proceeded to Guadeloupe (her port of destination) where she arrived on the 8th of January following, and there delivered her cargo to the said George Patterson. The cargo (at least the provision part of it) was taken from him by the administration of the island by force, with a promise of payment of its value. He loaded on board the said brig a return cargo, the produce of the island, and destined her therewith to Baltimore, remaining him-

self at the said island ; and she accordingly sailed from Guadaloupe *on the 18th of March*, bound on her said intended voyage : in the prosecution thereof, she was on the 20th of the same month (*two days* after her departure from the island) met with and taken as prize, by the British private sloop of war Agenoria. It appears by the evidence found on board the brig, that George Patterson had no intention of settling in Guadaloupe ; that his stay was meant to be for a short time only, (until the Betsey should return with another cargo;) that his views were to procure from the administration of the island, payment for cargoes which they had taken from him and his partner, and while he stayed to manage the affairs of the concern and conduct the lawful trade in which it was engaged to the best advantage. No act is proved to have been done or contemplated by him inconsistent with his neutral character and duties.

The allegation that when he went to Guadaloupe it was *in a state of blockade* (an assumed fact upon which the condemnation at Bermudas appears to have been founded) is admitted to be false. The suggestion that during his stay in the island, *it was notoriously expected to be blockaded*, is unsupported by the shadow of evidence—and if it were proved, it would be idle and un consequential. It cannot be necessary to argue that the *expectation of a blockade* does not render provisions contraband, or in any shape interfere with the freedom of neutral commerce. We are all agreed that there cannot be a *constructive block-*

ade to the prejudice of the trade of neutrals—and after this concession, it would be absurd to waste time in showing that the mere *expectation* of a blockade, when none exists in fact, or can be made out constructively, is not entitled to have that effect.

His sending to America for another cargo of flour *after the administration of the island had taken the Betsey's cargo by force*, was not the act of an enemy to Great Britain, but strictly lawful for him to do so as neutral. Is he to be called an enemy to Great Britain, because he did not petulantly resent the infringement of his rights by a colonial government of France?—and is he to be subjected to plunder, without retribution, by British cruisers, because a Guadeloupe administration, having seized his property under a promise of adequate compensation, he has thought proper to submit to this wrong, and even to hazard the repetition of it? If he chose to act thus, in the expectation of that profit which is the object of trade, what right has Great Britain to complain? The administration took *his* property not *theirs*; and if he discovered it to be more prudent to be silent on the subject, to wait for the promised payment, and even to import another cargo similar to the former, while he was so waiting, under a risk of similar violation, he has neither done nor intended any thing injurious to Great Britain,—provided the cargo imported was such as the law of nations did not prohibit.

If the reverse of this doctrine were true, I do

not know that the citizens of the United States could, since the year 1795, be at liberty to bring provisions to Great Britain without becoming enemies to France. For during that year the government of this country went far beyond the administration of Guadaloupe, in seizing and appropriating the provision cargoes of American citizens,

• In a word—the views with which George Patterson went to, and remained at, Guadaloupe, were fair and warrantable,—the trade he was prosecuting was not forbidden,—his conduct, while in the island, was, in all respects, such as the law of nations allows and prescribes to neutrals,—his stay there was intended to be, and in fact was, temporary,—he did not become an inhabitant of the island, but was a mere sojourner in it for special limited purposes lawful in their nature.

Still, however, it is said that his residence there, such as it was, made him, *under all circumstances*, the enemy of Great Britain.

In order that I may be distinctly comprehended in what I have to urge against the above opinion, I will begin with stating that I understood the law of nations, as applicable to this question, to be as follows : —

Neutral strangers who *settle*, or, in other words, take up a *fixed residence* for permanent purposes, however lawful they may be, in the territory of a belligerent nation, *flagrante bello*, and thereby become united to, and, *sub modo*, citizens or subjects of it, are liable to be treated as enemies by

the opposite belligerent; but neutral strangers, who merely pass or *sojourn* in the territory of a belligerent nation, for the management of their affairs, or in quality of travellers, or for in any other lawful temporary object, not hostile to the opposite belligerent, are *not* so liable to be treated.

From Vattel, abundant sanction is derived to this distinction.

(Vattel, b. 1st, ch. xix.) In Sect. 212—213, of this chapter, the author treats of the *citizens* and *natives* of a country, and of its inhabitants, as distinguished from citizens, who are in some sort blended with the society into which they have entered; and these again he afterwards distinguishes from *temporary sojourners* in the predicament of Mr. Patterson.

SECT. 213. "The *inhabitants*, as distinguished "from *citizens*, are strangers who are permitted "to *settle and stay* in a country. Bound by their "*residence* to the society, they are subject to the "laws of the state while they reside there, *and they* "*are obliged to defend it, because,*" &c.

The actual *inhabitants* then, here meant by Vattel, are such as are in some degree incorporated with the nation, and are liable to the *duties of citizenship*, although not enjoying all its advantages.

Such inhabitants have, doubtless, the quality of enemies, in respect of a nation at war with that in which they reside,—because they have voluntarily united themselves to the enemies of that nation, subjected themselves to their control,

bound themselves to defend their interests during their stay, adopted their prejudices and their enmities, and in short acquired in their country a citizenship complete as to *duties*, though not so as to *privileges*.

The same author says, in Sect. 215 of the above chapter, speaking of a man who has left his own country: "If he has *fixed his abode* in a foreign country, he is become a *member* of another society, at least as a perpetual *inhabitant*, &c."

But how is it with *sojourners*, whom Vattel distinguishes from *inhabitants*?

(Vattel, b. 2d c. 8th s. 99th.) "We have already treated (b. 1st c. 19, already quoted) of the *inhabitants*, or of the men who *reside* in a country where they are not citizens. We shall only treat here of the strangers who *pass or sojourn in a country, for the management of their affairs, or in quality of mere travellers*."

SECT. 101. (Speaking of such sojourners.) "But even in the countries where every stranger freely enters, the sovereign is supposed to allow him access only upon this tacit condition, that he be subject to the laws; I mean the *general laws made to maintain good order, and which have no relation to the title of citizen or subject of the state*."

SECT. 105. (Same subject.) "From a sense of gratitude for the protection granted him, and the advantages he enjoys, the stranger ought not to confine himself to the respect due to the laws of the country; he ought to assist upon occa-

“sion, and to contribute to its defence, *as much*
 “*as his being a citizen of another state may per-*
 “*mit him.* But nothing hinders his defending it
 “against **PIRATES** and **ROBBERS**; against the *ra-*
 “*rages of an inundation* or the *devastations of*
 “*fire.*” The author in this place, evidently sup-
 poses that (although in the case of an *inhabitant*
 or *fixed resident*,) every duty of a citizen is on
 such *inhabitant* while he continues, so there is no
 obligation upon a *sojourner* or temporary resident
 to assist in defending the country in a solemn
 war; and of course, that there is no obligation
 upon him inimical to the nation with which that
 country is in a state of hostility. But in Sect.
 106, he is still more explicit.

SECT. 106. “Indeed he cannot be subject to
 “the taxes, which have only *a relation to the citi-*
 “*zens*; but he ought to contribute his share to all
 “the others. *Being exempt from serving in the*
 “*militia, and from the tribute destined for the*
 “*support of the rights of the nation,* he will pay
 “the duties imposed on provisions, merchandise,
 “&c., and, in a word, every *thing has only a re-*
 “*lation to his residence in the country, and the*
 “*affairs which brought him thither.*” Thus then
 it is obvious that a neutral, who *sojourns* in one
 of the countries at war, for the purpose of manag-
 ing his affairs, and does not become a *settler* in, or
inhabitant of, the country, cannot, by reason of
 such sojourning, be considered as having subject-
 ed himself to any obligations injurious to the op-
 posite belligerent, as having associated himself

with its enemy, or as having lost the purity of his original neutral character. It appears that, notwithstanding such sojourning, he continues under the pressure of all his former duties as a neutral, and acquires none that are inconsistent with them.

To call such a man an enemy is to do violence to common sense.

SECT. 107. (Same subject) “The citizen or subject of a state *who absents himself for a time without any intention to abandon the society of which he is a member*, does not lose his privilege by his absence; he preserves his rights, and remains bound by the same obligations. Being received in a foreign country in virtue of the natural society, &c., he ought to be considered there as a member of his own nation, and treated as such.”

The nation then, with whom a neutral stranger sojourns, is, by the law of nations, to consider and treat him *as a member of his own country*: It cannot compel him to assist it in its hostile efforts against its enemy, or even in its defence against that enemy. He continues, notwithstanding his residence, to every purpose of the war, offensive or defensive, as much a neutral as if he was still in his own country. And yet it is imagined that the opposite power at war, merely *on the ground of his residence*, which does not alter his character, and is in no respect unlawful, may consider and treat him as an enemy!

Why is it then that neutral goods found in an

enemy's territory are not liable to confiscation, *if the quality of the place*, where a neutral shall himself be found, attaches itself thus powerfully to him ?

If this doctrine against which I am now contending were true, the converse of it would be also true. If *place* and not *character* is to fix a man as friend or enemy, an enemy would cease to be so as soon as he quitted the territory of his nation. Surely the character of enemy may be thrown off by the same means by which it may be acquired, where parallel means are practicable. But "enemies continue such, (says Vattel,) (b. 3, c. 5, s. 71,) wheresoever they may happen to be. The *place of abode* is of no account. It is *the political ties* which determine the quality." Here is the true criterion by which friend or enemy is to be ascertained. The *political ties*, not the locus in quo, designate the quality. Has the party duties upon him in favour of one of the belligerents against the other, which, if called into action, would be hostile in their effects ? If he *has*, no matter in what part of the world he shall be found, he is an enemy. If he has *not*, you cannot treat him as an enemy, without trampling upon the laws of nations, although you should find him in the heart of the country with which you are at war.*

I have already shown that a sojourner in a country with temporary views, or one who has not

* This is upon a supposition that he does not act hostile in its nature, as in the case of Mr. Patterson.

in fact *settled in it*, has no such *political ties* to that country as to make him an enemy to those with whom it may be in a state of hostility—that his duties do not point to the annoyance of any nation—and that the obligations which bind him, are as perfectly neutral as those he brought along with him.

The foregoing observations are confirmed by Burlemaqui's Principles of Political Law. (p. 281, s. 6.) "As to strangers, those who *settle* in an enemy's country after a war is begun, of which they had previous notice, may justly be looked upon as enemies."

P. 299. "It is also certain, that in order to appropriate a thing by the right of war, it must belong to the enemy;—for things belonging to people who are neither his subjects, *nor animated with the same spirit as he is against us*, cannot be taken by the right of war, even though," &c.

By *settlers* in a country, it will not be imagined that those are meant who sojourn in it with temporary views, and who come without any intention of abandoning their own country, or becoming *inhabitants* of another. In the description of "*those who are animated with the same spirit against us*," it will not be supposed that those are included, who, with a complete neutral character and with every neutral obligation upon them, go for a time into the belligerent country on a lawful errand, having no relation to hostility—and, while there, take no improper part in the national

quarrel, but confine themselves to the object which brought them thither—who bind themselves by no ties to the nation in whose territory they are, at variance with those which marked and constituted their neutrality, and who continue as free from any duties, adversary to either of the contending parties, as if they had remained at home.

It is plain that Burlemaqui's meaning is the same with that of Vattel. By *settlers* he intends those whom Vattel calls *inhabitants*, who may fairly be presumed to be *animated with the same spirit* with the nation with whom they have permanently mingled, to whose interests they have joined their own, and under whose subjection they have placed themselves. Such may be said to make common cause with the nation and to adopt its quarrel. Thus far the doctrine may justly be carried; but when a neutral trader goes into an enemy's territory for a few weeks to conduct a legal trade, to call in precarious debts, or to do any other act connected with a commerce which no law condemns, when, during his stay, he does nothing to make common cause with the enemy, or to evidence his intention of espousing its quarrels, it is so manifestly unreasonable to call him an enemy upon such a foundation, that no argument can lend even a colour to it.

Lee on Captures, (p. 65) gives us his opinion on this subject precisely in the words of Burlemaqui, and accounts no strangers as enemies but such as settle in the enemy's country.

The following is copied from a manuscript note of Lord Camden's opinion in two of the St. Eustatius' cases, (*Harmonie* and *Jacobus Joannes*,) heard on the 10th of February, 1785, put into my hands by a respectable gentleman in the profession.

"If a man went into a foreign country upon a visit, his travels for health, to settle a particular business, or the like—of such persons, so *temporarily residing*, he said, he thought it would be hard to seize upon their goods. That a residence not attended with these circumstances ought not to be considered as a permanent residence."

In applying the evidence and the law to the resident foreigners in St. Eustatius, he said—"In every point of view they ought to be deemed *resident subjects*. Their persons, their lives, their industry, are employed for the benefit of the state under whose protection they lived; and if war broke out, they continuing, they paid their proportion of taxes, imposts, and the like, equally with natural born subjects, and no doubt come within that description."

The note concludes with stating, "that the goods in both ships (*viz.* the *Harmonie* and *Jacobus Joannes*,) were condemned (except those belonging to *Erutz*) upon the ground of *permanent residence* or *inhabitaney* of the owners in an enemy's territory."

The ground upon which the property of *Erutz* was excepted from the condemnation, is stated in

the note to be, "*that he was an occasional resident at Amsterdam.*"

It is evident from this opinion of Lord Camden that he did not consider a temporary sojourner in an enemy's country as the proper object of hostility, but that he rested his decision wholly on the fact of *permanent inhabitancy, a fixed and settled residence*. Such was the doctrine in this country formerly; and, if it has been changed, it will not be easy to prove that the change is justified by the law of nations.

Even the form of the commission of reprisals issued by this country, during its present and former wars, concurs to establish the distinction with which I set out. It gives authority to seize property belonging to France, or to any persons being *subjects* of France, or *inhabiting* within any of the territories of France. Such also is the language of the different prize acts.

We have seen in Vattel the true notion of an *inhabitant*, and it cannot be pretended that a temporary sojourner does, even in common parlance, come within the meaning of that term.

The only authority which has been mentioned at the Board as opposed to the principles I have endeavoured to establish, is a passage in Grotius, lib. iii. c. 4, s. 6.

For an answer at large to this authority, I shall content myself with referring to the written opinion of Mr. Goré. I am induced to this, because in the written opinions of one of the British commissioners, lately filed, that authority, though

originally relied upon to prove that any person found, or being in an enemy's territory, was absolutely liable to be treated as an enemy, is used for a different and a less extensive purpose, meeting my approbation.

Upon the whole I take it to be clear, that, upon the footing of residence, George Patterson's property was not liable to condemnation.

It would not be proper, however, to dismiss the question without noticing the particular manner in which one of the commissioners, in his written opinion, sustains the condemnation of George Patterson's property. The argument stands thus:—All persons who are within the enemy's territory are, *prima facie*, to be considered as enemies and liable to hostilities. (Grotius.) George Patterson being at Guadaloupe at the time of the capture, of course came within this rule, and to extricate himself from it, it was incumbent on him to show—"that he was there acting in a manner perfectly consistent with the strict duty of a neutral. The burden of the proof was upon him." It is then supposed, and attempted to be shown, that he has failed in this proof.

Even if it be admitted that the above rule is a sound one, and I am not disposed to question it, the application of it is certainly exceptionable. To extricate himself from the operation of such a rule, it could only be incumbent on Mr. Patterson to prove himself an American citizen. That fact being established, (as it was by all the evidence on board the brig,) the neutrality of his

character stood free from the presumption against him, arising solely from the place in which he happened to be. The burden of the proof would then be transferred from him to the captors.

By showing that he was a citizen of the United States, he showed that he was no enemy to Great Britain ; and, if the captors desired to defeat the effect of that evidence, it was indispensable for them to go further than barely to prove that he *was in an enemy's country, which in itself was* not at all inconsistent with the neutral quality attached to his citizenship of a friendly nation. Until they showed that he had done some act by which he had forfeited the friendly character, which all the ship's papers proved him to possess, that friendly character was entitled to protect him. They did not prove such an act by merely showing that he had gone to Guadaloupe a few days or weeks before the capture, on a commercial errand, and had, at the time of the capture remained there *two days* after the sailing of the vessel of which he was supercargo ; since all this was perfectly lawful for him as a neutral to do. They did not prove such an act in any way ; neither his actual stay in the island, from the time of the brig's departure, to the time of the capture, (two days,) nor the stay he intended to make, as declared by one of his letters; (until the brig should return with another cargo,) can be said to come up to the idea of a *permanent residence*, let such stay be coupled with what lawful acts it may, so as, upon the footing of *inhabitancy*, to make him

an enemy to Great Britain. It cannot be pretended that, while at Guadaloupe, he did any act not admitted to a neutral by the law of nations. On the contrary, it may confidently be asserted that he did nothing *inconsistent with the strict duty of a neutral*. His object in remaining at the island, was manifestly to procure payment of what was due to him from the administration ; and, while so employed, to make such mercantile profit, by conducting the usual trade of the partnership as might be practicable. That the island wanted provisions is probable, and that he wished to have an opportunity of supplying it, not only on account of the price of flour, but also on account of the profit to be made by a return cargo, is certain ; but it was strictly consistent with his duty as a neutral to do so. In short, he was neither an enemy by residence, nor by reason of any conduct unlawful to a neutral.

It is supposed that, even admitting the property of George Patterson not to have been liable to condemnation, there was at least *probable cause* of seizure and detention for the purpose of judicial inquiry.

If this *probable cause* be referred to any ambiguity as to *facts* at the time of the capture—I answer that no such ambiguity existed. But it is not in *this view* that there is believed to have been probable cause of seizure. The *law* arising from the facts appearing in the letters of George Patterson, is imagined not to have been so clearly in his favour as to render detention, for the pur-

pose of obtaining judicial opinions upon it, illegal. But, in my judgment, it was so clearly in his favour, that I confess myself astonished that any doubt could be entertained about it.

It is not satisfactory to insist upon the Vice Admiralty of Bermudas and the Lords of Appeals condemning the property, as sufficient evidence of probable cause. The sentence of the Vice Admiralty of Bermudas, founded upon a ridiculous falsehood, abandoned by every body, is no evidence of any thing but the folly of the judge who passed it. The sentence of the Lords is that of a tribunal, respectable in the highest degree for talents, integrity and station ; but even the commissioner who recommends it to us as conclusive proof of *probable cause*, confesses that it was an *erroneous sentence*, inasmuch as it condemned the property of *William Patterson*, as well as that of *George Patterson*. For this sentence, *as it stands*, it is impossible to find or conjecture a reason ; and yet we are told that we ought to receive it as irrefragable proof of probable cause. The sentence of the Lords is either erroneous, or it is not. If it is not erroneous, we ought to decide in exact conformity with it. If it is erroneous, it cannot, in any shape, be an authority for us. We are unanimous, that, as to *William Patterson's* property, it is *palpably* erroneous ;—that no pretext can be imagined even to *countenance* it in respect of his property ;—and a majority of the Board are of opinion, that it is *clearly* erroneous *in toto*. After this, it is at least novel to rest the proof of

probable cause upon the authority of that sentence. The question of *probable cause* is as much a question upon which it is our duty to decide, *according to our own judgments*, as the question whether the condemnation was rightful; and if the sentence of the Lords is not allowed to be sufficient to control our judgments on the latter question, I see no reason why it should be allowed to control it on the former;—especially when the sentence thus set up as a proper guide to decision on the former, is nothing more than a confessedly erroneous sentence upon the latter. As to the opinions of the commissioners who differ from the majority on this subject, if they were sufficient evidence of probable cause, it would follow that every decision against probable cause ought to be unanimous.

In short, I hold it to be plain that there was not the smallest foundation for the seizure in question;—and that if the captor thought proper to make the seizure upon any mistaken idea of the law of nations, he did it at his peril; and that his nation, in default of redress against him, is to indemnify the parties injured. And, thinking thus, I cannot persuade myself that I am to sacrifice the conviction of my own mind, not to the *reasons* of others, but to the *acts* of others, admitted on all hands to be founded on misconception.

The last question which occurred at the Board in this case, respected the rule of compensation

to be applied to it in relation to the cargo. The majority were of opinion that the claimants were entitled, not only to the value of their merchandise, but to the nett profits which would have been made of it at the port of destination, if the voyage had not been interrupted. This opinion proceeded upon the supposition that the voyage was *wrongfully* interrupted—and upon that supposition would seem to be free from exception. It has been questioned, however; and I shall, of course, assign my reasons for adopting it.

There can be no doubt that the illegal capture and condemnation of this vessel and cargo have given to the claimants a title to receive from the British government the value of the things of which they were deprived;—but the question is whether they have not also a title to receive the *profits* that might and would have arisen from them?

The right of the claimants to the cargo was a perfect one; and for that reason, they are authorized to demand compensation for its value;—but *this* right was in no respect better or more perfect than their right to proceed upon the voyage, and to make such profit of the goods as the situation of the destined market would at the time of the vessel's arrival, enabled them under all circumstances to make.

When the claimants show (and a majority of the Board have determined that they *have* shown it) that the cargo belonged to them;—that the voyage which the vessel (also the property of one

of them) had commenced was a lawful one;—that there was no ground upon which she could justifiably be seized or detained, they prove a complete right to prosecute that voyage, without molestation, and to acquire such advantages therefrom as in the course of trade might fairly be calculated on.

According to a written opinion filed by one of the Board on this occasion, no compensation is due for the violation of this latter right; for it states “that to reimburse the claimants, the *original* cost of their property, and all the expenses they have actually incurred, together with interest on the whole amount, would be a *just and adequate* compensation.” But what substantial reason can be assigned, why one of the claimant’s rights shall be selected as a proper object of compensation, while another of their rights, equally indisputable, and equally violated, shall be left without any compensation at all?

No compensation for an injury can be just and adequate which does not repair that injury; but he who wrongfully deprives me of a lawful profit which I am employed in making, cannot be said to afford reparation until he has given me an equivalent for the advantages of which he has deprived me; to which advantages my right was as unquestionable as the right I had in the things from which they were to arise.

Rutherford (1 Inst. Nat. Law, p. 105, s. 5) lays down the rule that “in estimating the damages which any one has sustained, where such things

"as he has a perfect right to, are unjustly taken
 "from him, or withheld, or intercepted, we
 "are to consider, not only the value of the thing
 "itself, but the value likewise of *the fruits or*
 "*profits that might have arisen from it.* He who
 "is the owner of the thing, is likewise the owner
 "of such fruits or profits. So that it is as pro-
 "perly a damage to be deprived of *them* as it is
 "to be deprived of the thing itself." "But it is
 "to be considered whether he could have received
 "these profits without any labour or expense; be-
 "cause if he could not, then in settling the dama-
 "ges for which reparation is to be made, the pro-
 "fits are not to be rated at their full worth; but
 "an allowance is to be made for the labour or ex-
 "pense of collecting or receiving them; and when
 "the labour or expense is deducted from their
 "full worth, the remainder is all that he has lost,
 "and, consequently, is all that he has any title to
 "demand."

"In rating the damages which a man has sus-
 "tained, we are to estimate something more than
 "the present advantage which he has lost: for the
 "hope or expectation of future advantage is worth
 "something: and if such hope or expectation is
 "cut off by the injury, the value of it is to be al-
 "lowed him. We must, however, in estimating
 "this hope, be careful not to estimate it as if the
 "advantage were in actual possession. Proper
 "deductions are to be made for the accidents
 "which might have happened to disappoint his
 "expectations. And in proportion as these acci-

“dents are greater or more in number, or more likely to happen, a greater abatement is to be made in consideration of them, &c.” *Id.* p. 416.

“Not only the damages which a man sustains from an unlawful act are chargeable to them who do the act, but those damages are likewise to be made amends for, which are the consequence of such act.” *Id.* p. 409: s. 8.

The foregoing quotations are supported by Grotius, (lib. 2, c. 17, s. 4—5.) and also by Puffendorf. It is to be admitted, that in the case before the Board, the claimants' prospect of profits (provided insurance had not been made upon both profits and cargo,) was not entirely certain; for the cargo might have been damaged or lost, and, of course, in the language of Rutherford, we should be careful “not to estimate those profits as if they were in actual possession.” But it is also evident that the profits were just as secure as the *cargo itself*, and were subject to no other risk than the cargo was exposed to. With a view to prices, there was no risk at all, since we resort to the prices which are proved to have been those at which the cargo might have been sold if it had arrived. In that respect we have facts by which to regulate our estimate, and not possibilities. If then the danger of loss of, or injury to, the cargo, was the only circumstance which rendered the claimants' profits precarious, it is extremely easy to make an allowance for that hazard, in the same manner as in ascertaining the value of the cargo itself. We have only to make

a proper deduction for the sea risk—and for this, the rate of insurance upon such a voyage as the vessel was engaged in, will furnish us with the best possible rule. The rate of insurance is the value of the hazard, and it is that criterion upon which we may safely rely, since it is that value which is uniformly paid and received for the sea risk by those, who are able, from their pursuits, and induced by their interests, to calculate it accurately.

Some objections were started at the Board, against the ascertainment of the probable profit, by reference to the prices current at the port of destination.

It was said to be better to give 16 per centum on the invoice price; and this was alleged to be, and is, the rule in the Court of Admiralty, in provision cases, under the Orders of April, 1795. But it is obvious that this rule is an arbitrary one, suggested indeed by a good principle, but not acting upon it. It supposes (what is true) that a claimant is entitled to compensation for his profits as well as for his capital. And so far it adds weight to the foregoing remarks; but it cannot pretend to ascertain what those profits would be.

Ten per centum may be either more or less than a just compensation. It may be a good average rule among various claimants; (though if it is so, it can only be by accident;) but surely it is no consolation to a claimant who gets *less* than is due to him, that another with whom he has no connection, has got *more*. Our province is to

render justice to each individual complainant. It is not sufficient that our awards shall cover the aggregate losses of all the different parties injured, unless we distribute compensation in equitable proportions.

It is supposed that there can be no certainty in estimating profits, with a view to the prices current at the port of destination. I am satisfied of the contrary. To ascertain the current prices of the commodities composing the cargo, at the destined market, at any given time, is neither impossible nor difficult. What those commodities were, together with their quality, may be shown by the ship's papers and other testimony. The deduction for risk is known at once by the rate of insurance, and the expenses of freight, landing, storing, &c., and the amount of duties no person can be at a loss for.*

The principal reason assigned for this uncertainty, is the difficulty of fixing the precise influence which the arrival, not only of the vessel in question, but of other American vessels detained by British cruisers, contrary to the law of nations, would have had upon the market if they had been allowed to proceed upon their voyage. My answer to this is, that any influence which can be attributed to the arrival of the particular ves-

* These observations are confirmed by the experience we have had, of the operation of the rule in the several cases to which it has been applied, since it was first adopted by the Board. Its execution has appeared to be easy, and its result certain.

pel in question, ought to be attended to, and that this is capable of a reasonably accurate calculation; but that the possible effect of the arrival of other captured vessels upon the market, is manifestly improper for our consideration.

The claimants had a right to make, and would have made, such profits of their voyage as the *actual* (not the possible) state of the intended market would afford. The circumstances by which that state was produced, (whether the wreck of other vessels, bound to the same port, or their illegal detention by British cruisers,) could neither make a change in their right, nor extenuate the violation of it.

I cannot, for my part, perceive any thing monstrous in this opinion; but I can see much room for objection to the opposite doctrine, that, although profit is the lawful object of a merchant; although he has a right to make such profit, as the *real*, not the hypothetical situation, of the projected market, holds out to him; yet, that a belligerent, unjustly interfering with that right, and wresting from him the effect of it, is not bound to grant him retribution commensurate with the actual damage; because, if it were not for the unlawful conduct of that belligerent towards various other neutral merchants, the actual damage *might have been less*.

If the prices of merchandise at the port of destination had been inflamed by the *act of God*, (the wreck of many vessels bound to that port,) it is not supposed that we ought to consider, in the

estimate of the neutral's probable profits, the influence which the arrival of the vessels so wrecked might have had upon those prices. In such a case it is agreed that a neutral is to be compensated, (if he is to be allowed any profits at all,) with a view to the *real* state of the market, or, at least, that nothing is to be deducted for any change which that state might have undergone, if these vessels had, instead of being wrecked, brought their cargoes to their intended ports. And yet one would think that the belligerent would be more at liberty to set up the *act of God*, to which he was no party, in extenuation of the retribution required of him, than acts of injustice theretofore committed by that very belligerent, or its commissioned cruizers, towards the fellow citizens of the claimants.

It does not appear to be a very satisfactory argument, to say that the rule adopted by the Board is uncertain, although it acts upon *things as they are*, because a state of things not existing might have produced an incalculable variation; and the argument is more especially unsatisfactory when it is considered that this alleged uncertainty, which a belligerent is made to urge as the means of evading reparation for a wrong to the actual extent of the loss resulting from it, has been confessedly produced by the illegal conduct of that belligerent, or those acting under its authority. When it is recommended to us to desert the sure grounds of *facts*, to employ ourselves in an impracticable calculation upon possibilities, we

should have some stronger inducement to do so than merely to protect a belligerent from the obvious consequences of its own injustice, or that of its commissioned subjects. When we are asked to reject the fair rule of measuring the compensation for an injury, by ascertaining the complainant's right, and the damage really sustained by the infringement of it, we ought to have a better reason for compliance, than that the damage might have been less if the same wrong-doers had not previously committed similar injuries.

If we are to abandon the criterion which the actual prices current offer to us, I do not know a substitute so inadmissible as that suggested. It rests upon the most exceptionable of all principles, that he who does wrong shall be at liberty to plead his own illegal conduct on other occasions as a partial excuse.

It is said, indeed, that the British government will be injured in the aggregate of compensation awarded, if the possible influence of the total of illegal captures on the market is excluded from consideration.

Doubtless, if it be true that these captures raised the price in the different markets, (which I am not convinced of,) and if each claimant is compensated with a view to that price, the aggregate amount of all the compensations will be more than the claimants collectively would have received as profits, if every vessel so captured had arrived at her place of destination. But we are not rendering justice in the aggregate, nor is it possible to do so,

without producing particular injustice. Complainants do not come before us as a body, with one case and upon one bottom, but as unconnected individuals setting up distinct rights, and complaining of distinct losses. Each complainant's case is entitled to be determined according to the injury which that complainant has received ; and it can be no reason for not indemnifying him to the extent of it, that his loss would not have been so great, if none others could complain of the like violence to their neutral rights.

- If a thousand illegal captures had preceded that of the *Betsey*, and raised the price of the articles with which she was freighted, the only consequence would be, that the claimants had an undoubted right to avail themselves of that raised price ; and Great Britain having no possible right to prevent them, but choosing (or at least her cruisers choosing) to interfere with their title, must make reparation equal to the damage, such as it was, not such as it *might have been*, under circumstances not existing.

It is immaterial whether the prospect of profit was bettered by the same persons that wrongfully prevented it from being realized, or by other persons, or by mere accident. It is enough that the profit might lawfully be made, that the claimants were lawfully employed in making it, and that the British government (or its commissioned captor) unlawfully interposed so as to defeat their efforts. The right existed with a view to the profits *actually attainable*, without reference to the

circumstance, that made it attainable ; and the right being ascertained, the compensation is inadequate unless it is co-extensive with it.

We need not be apprehensive that any injury will be done to Great Britain by this mode ; for it will not pay to any complainant more than a compensation *for the actual loss and damage* sustained by him, as expressly stipulated by the treaty.

It is observed in the written opinion already quoted, "that the claimants appear to have forgot that if neutrals are to enjoy the benefits arising from a state of war, they must be content to bear part of its inconveniences ; or, on the other hand, if they claim to be exonerated from all the risks and inconveniences of war, they must agree to forego its advantages. They are not to say, give to my commerce the security of a state of peace ; but, give me the profits of a state of war. The risk and the profit are the counterpoise to each other."

This may be admitted, if I understand what it means. Every neutral trader does and must stand the *risk* which the *law of nations* annexes to the state of war. A neutral who trades in *contraband* hazards confiscation. A neutral who trades to a besieged or blockaded port with notice, runs the same hazard. A neutral who carries enemies' goods, runs the hazard of search, seizure, detention, &c.

The *inconveniences* to which the *status belli* subjects neutral commerce, are, that it cannot be

carried on so freely as in time of peace ;—that a neutral nation cannot trade with either of the belligerents in certain articles ;—or at all to such ports of either as are in a state of siege or blockade ;—that it cannot carry the goods of either without being subject to search and detention ;—and, in short, that, in the prosecution of its trade, it must observe an impartial neutrality.

These are the risks and inconveniences to which a neutral must submit, because the law of nations imposes them on him.

If any other risks or inconveniences (such as the risk or inconvenience of illegal seizure or confiscation) are intended by the above cited observations, it need only be said that they are not such as the law of nations authorizes, however they may be arbitrarily imposed by one or all of the powers at war.

Let us now compare the above cited observation with the consequences deduced from it. “ To reimburse the claimants *the original cost of their property*, and all the expenses they have actually incurred, together with *interest on the whole amount*, would be a *just and adequate compensation.*” “ To add to the original cost of the property a *reasonable mercantile profit, such as is usually made in time of peace*, would amount to a very *liberal compensation.*”

According to this opinion, then, taken altogether, the neutral shall incur all the risks and inconveniences of the *status belli*, and yet shall have either *no profits at all*, or only the *peace profits*.

The law of nations imposes restrictions upon neutral commerce during war which the belligerents may and do enforce.

If the neutral attempts to carry on a trade which the state of war renders unlawful to him, his property, says the law of nations, shall be confiscated. Here (as in many other respects) the inconveniences of the state of war operate upon him. But again, says the above opinion, if he is carrying on a lawful trade, and his property is seized and confiscated by one of the powers at war upon some illegal pretext, he is to receive as a compensation, either no more than the invoice price of his goods, or that price and the peace profit.

Where then are the war profits, to be set against the war inconveniences? You enforce against the neutral the inconveniences and risks to which he is liable, and yet you do not permit him, in cases where his conduct is unexceptionable, to make or enjoy the profits which it is admitted are and ought to be their counterpoise.

If in one instance a lawful neutral trade can be interrupted by a belligerent, on the terms of paying to the party aggrieved only the first cost of his merchandise, or that and the peace profit, it is evident that this can be done in every instance. Who does not see that, if this doctrine be true, a state of war burdens neutral commerce with the restraints and disadvantages lawfully incident to that state ;—and yet that a neutral can, in no circumstances, be entitled to the war profits, or, indeed,

any profits at all as a counterpoise to them, if either of the belligerents has the power and inclination to seize upon his property?

What becomes of the admission that the war profits are the neutral's compensation for the inconvenience to which the law of nations subjects the commerce of his nation, if it is maintained that the war profits are rightfully at the mercy of such of the belligerents as shall be strong enough to defeat them?

If I were to make the claimants speak upon this occasion, I would make them say, "the trade of our nation is by the law of nations subject to certain restrictions resulting from the state of war in Europe; in consideration of which, such of our citizens as do not violate these restrictions and conform themselves to their neutral duties, are entitled to the war profits. We have not violated these restrictions; we have conformed ourselves to these duties; and were, of course, entitled to make the war profits. You have prevented us from obtaining them, by an illegal seizure and confiscation of our vessel and cargo; and we now claim retribution equal to the injury." What could be replied to this?

We are told that the invoice price is the measure of compensation usually adopted by all belligerent nations, and accepted by all neutral nations.

I understand that this is not, even at present, the case in this country. Where the property has

been sold, the *nett proceeds* are given in ordinary cases, and in the provision cases *the invoice price and 10 per centum profit* was given. Mr. Gore has referred to an adjudged case, to prove that in England the very rule adopted by the Board has been heretofore in practice. But it is not likely that there is to be found any one rule which has been received and adhered to in the Courts of Admiralty of all countries, or even of many countries.

It is also said "That the trade in which the vessel was engaged was barely not unlawful:" and this is suggested as proper to influence the quantum of compensation. But if the trade was not unlawful, it was surely as lawful as any trade can be. I know of no mode by which the absolute legality of a trade can be proved, in reference to the law of nations, but by showing that this law does not prohibit it. Such, it is admitted, was the trade in which the *Betsy* was employed, and I cannot conceive how any trade can be said to be lawful in any other sense. If the trade was lawful at all it was completely so; and, of course, was entitled to security as far as any trade could be so entitled. There is no medium between legality and illegality. It is true, there are certain illegal acts more injurious and more wicked than others, and, consequently, requiring and justifying heavier punishment;—but it is incomprehensible how an act confessedly legal, can ever be the

object of punishment upon a loose idea that it was *barely not unlawful*.*

It is said further that the treaty intended to substitute a new *mode*, not a new *measure* of compensation. Upon the question of jurisdiction, I have understood it to be urged that a new *measure* of compensation was almost the only object of the treaty. We have been supposed to have the power of relieving, in cases where the Lords have given only the *nett proceeds*, in consequence of the rule to that effect in the Prize Act, and in cases of seizure under the Orders of Council where the Lords are bound to refuse costs and damages against the captor. But it is in vain that we have power to entertain these cases, if we are not to introduce any *new* measure of compensation, however justice may require it. If we are to adopt the measure of redress applied by the Lords, our jurisdiction in such cases is a ridiculous nonentity. But be this as it may, the words "adequate compensation," and "full and complete compensation," to be found in the 7th article of the treaty, do not warrant the above interpretation of it.

I have thus stated the principal reasons which have governed my judgment in the case of the *Betsy*. I have not been able to avoid the discussion of such objections as have been insisted

* Vid. 1st Burlamaqui, 116.

on against the opinions-I have delivered on the several points that have occurred in the progress of this case.

For such of the commissioners as differ from me I feel the best founded respect; but I could not explicitly detail the grounds of my decisions on this occasion, without noticing topics that were believed to militate against them, and with that impression have been put upon our files.

LONDON, *1st July*, 1797.

WM. PINKNEY.

THE NEPTUNE.

A PROVISION CASE.

MR. PINKNEY.—This case has gone to the merchants upon the opinion of a bare majority, consisting of the two American Commissioners and the fifth Commissioner;—and of course, I think myself, as one of that majority, strongly called upon to state and file the reasons which have governed my judgment.

In making this statement I shall not (as it has been supposed I ought to do) confine myself to what is called the question of jurisdiction. The motives which influence me to record the grounds of my decision, arise out of a sense of the delicacy of my situation; and these motives apply as forcibly to a decision upon the merits, as to a decision upon the import of the words of the treaty.

In the course of the following detail it will appear that I have sometimes noticed the topics insisted on by others, as militating against the determination of the Board; and it is proper for me to observe that I have not studied to avoid this.

My sole view is the vindication of my own opinion; but this requires the discussion of objections to it.

If the manner in which this is done shall be temperate and decorous, (and I hope I am incapable of adopting any other manner,) the thing itself can neither be offensive nor reprehensible. I may, indeed, misrepresent what possibly I may not have understood; but it will be easy for those whose ideas I have misconceived, to counteract the effect of accidental misrepresentation, by putting on record their real thoughts.

The general nature of the case is briefly as follows:

In April 1795, (between the time of the signature of the treaty and the time of exchanging the ratifications) his Britannic Majesty in council issued an instruction to the commanders of his ships of war and privateers, &c., by which they were directed to stop and detain all vessels loaded wholly or in part with corn, flour, meal, and other articles of provisions therein mentioned, and bound to any port in France, &c., and to send them to such ports as should be most convenient, in order that such corn, &c., might be purchased in behalf of his Majesty's government.

I state the tenor of the instruction, not from any authentic copy, for that is not to be obtained; (the instruction never having been published, as is customary,) but from a collation of the evidence of its purport with the first additional instructions of the 8th of June, 1793. The substance is sufficiently established by proof, and I have merely borrowed, from the instruction of 1793, the language in which it was probably clothed.

In virtue of this instruction, the *Neptune*, belonging to American citizens, laden in part with rice, and bound on a voyage from Charleston to Bordeaux, in France, was stopped by one of his Majesty's ships of war, and finally brought into the port of London, where proceedings were commenced against her in the High Court of Admiralty.

The Court of Admiralty ordered the cargo to be sold to his Majesty's government, and the proceeds* to be brought into court for the benefit of those who should be entitled; and upon a claim being made in the usual form, in behalf of the owners, restitution of the cargo or the value was decreed. The ship was restored with freight, demurrage, and expenses.

The ascertainment of the value of the said cargo, and the account for freight, demurrage, and expenses, were referred to the registrar and merchants.

* The proceeds never were brought into court.

The registrar and merchants, in ascertaining the value of the cargo, allowed much less than the claimants demanded, and much less than it would have produced at Bordeaux, or even in London. The rule by which they made this ascertainment was the *invoice price, and a mercantile profit of 10 per centum*, which they alleged they had not the power of departing from, that rule being prescribed to them by the British government in all cases under those orders.

Mullet & Co., the agents of the claimants, upon the arrival of the ship at Portsmouth, applied on their behalf to the Lords of the Treasury, and also to Claude Scott, Esquire, the agent appointed by the British government for the management of cargoes of this description, offering to indemnify the British government against all claims and demands on account of the capture, and also to give security to sell the cargo in England, provided it was given up to them to be sold on account of the owners. His offer was refused.

The claimants did not except to the reports of the registrar and merchants, but, being told by the officers of the government that payment of what was so reported could only be obtained by joining in a prayer for their confirmation, they did so accordingly, (protesting against their errors and justice,) and received from his Majesty's government the amount of these reports.

The memorial is for further compensation, over and above the compensation already received

from the British government under the above reports.

Upon the coming in of the memorial, the following preliminary question was started :

Whether it sufficiently appears that the claimants could not obtain, have, and receive, *by the ordinary course of judicial proceedings*, adequate compensation for the loss and damage they are supposed to have sustained by the seizure complained of?

Upon this question, I have given my opinion in the affirmative, and the following are my reasons :

There are only two parties against whom complete judicial redress is alleged to have been practicable, viz. the captor and the British government ; and if it is clear that it was not attainable against either of these, it follows that it was not attainable at all.

1st. I am satisfied that it was unattainable against the British government in such manner as is pointed out by the treaty.

One would think that this position need only be stated to be acceded to. It has been combated, however, and therefore requires to be remarked upon.

It will not be pretended that the sentence of Sir James Marriot, or of the Lords of Appeal, would, as against the British nation, have carried along with it any further efficacy than the government of the country *chose to give to it*.

He who should seek the performance of such a sentence, must address himself to the *discretion*

of the government, and not to the powers of any ordinary judicature known to the laws or constitution.

It has been admitted (and very properly) by one of the Board, in a written opinion filed on a former occasion, that the treaty extends to cases "to which circumstances belonged that rendered *the powers of the Supreme Court, acting according to its ordinary rules, incompetent to afford complete compensation.*" I do not think that this admission is co-extensive with the actual scope of the treaty; but, as far as it goes, no person will question the propriety of it; and surely no case can be imagined more unequivocally within it, than the case I am now considering, in the view in which it is now presented to us.

The powers of the Lords (as well as those of the High Court of Admiralty) were, and are, notoriously incompetent to afford *any compensation at all* against the British government in the sense the treaty contemplates.

They may be competent to pronounce an opinion in judicial form, that compensation ought to be afforded, but the opinion when pronounced would be intrinsically inefficient and powerless.

It is said, indeed, that the government would be bound in *good faith* to comply with any sentence the Lords or the High Court of Admiralty might pass upon the case; and I am not disposed to doubt that it would have done so. But the treaty does not call upon the claimants to apply to the *good faith* of either of the contracting parties, except through our instrumentality.

The claimants, when they come to us, are required to show that they could not obtain, have, and receive adequate compensation *by the ordinary course of judicial proceedings*. On this occasion (unless the captor was liable) they show, beyond all controversy, that this was impracticable, by proving that the only party against whom redress was demandable, could never be affected by the ordinary course of such proceedings.

They show that, although judicial proceedings, as against that party, might possibly have reached a certain point, i. e. *the formal rendition of a judgment*, they could never, in the nature of things, reach that point expressly designated by the treaty, i. e. *the actual receipt of complete compensation*. They show that, even if the Lords, or Sir James Marriot, had adjudged in their favour to the utmost extent of their present demand, all *beyond that judgment* must of necessity have been a perfectly discretionary act on the part of the British government, with which the ordinary course of judicial proceedings could have no connection, and which they could not in any shape have accomplished. It is not to such nerveless judgments that the treaty can be supposed to refer the claimants.

Thus, in the case of the insolvency of the captor and his securities, the Court of Appeals may pronounce a sentence; but as it cannot enforce that sentence by reason of the insolvency of those upon whom only it can operate, we are all agreed that the claimant is entitled to come here for re-

dress. The present case is infinitely stronger than that of an insolvent captor, &c.; for there the incompetency of judicial authority results from a fact collateral to it, whereas here it is radical and inherent.

The Lords never had, and never can have, even the shadow of power to execute a decree against the government of Great Britain. No proof, no experiment, can be necessary to establish a truth so palpable.

Will any one maintain that the compensation, already paid on this occasion, was obtained, or could have been obtained against the British government, by the *ordinary course of judicial proceedings*? On the contrary, it is certain that the payment was merely voluntary, and that, although consequent upon, it was not, and could not be, procured by any judicial proceedings whatsoever:

It is in proof that, notwithstanding the decree, payment was refused, unless the claimants would join in a prayer for the confirmation of the report of the registrar and merchants—and it was in virtue of their constrained consent to do so, that they have received what has been paid to them. If the refusal to pay had been *peremptory* instead of conditional, by what form of judicial proceedings could the claimants have compelled compliance against the sovereignty of the British nation?

In short, it is an incomprehensible solecism to talk of obtaining, having, and *receiving* adequate compensation against the government of

this country, by the ordinary course of judicial proceedings. The moment it should be granted that redress was only practicable against the government, it would follow, as a self-evident conclusion, that it was not judicially practicable at all to the extent intended by those who appointed us.

A decree for compensation is not compensation in fact,—and however the former might have been obtained against the government in the ordinary course of judicial proceedings, it is certain that the latter (of which only the treaty speaks) was not so attainable.

If this part of the question be plain upon the letter of the treaty, it is (if possible) yet plainer upon its spirit.

With what rational object can it be conceived that the treaty should compel the neutral claimants to apply to the Lords of Appeal for retribution against the government of the country, before their complaints shall be laid before us? In ordinary cases between *claimant* and *captor*, there is the best reason for such an application. The national responsibility in such cases would be lessened in proportion to the quantum of compensation judicially received from the individual wrong-doer; and if the compensation so procured from the individual should be equal to the injury, the national responsibility upon which we are appointed to act would be at an end.

But in a case where the government, and the government only, is answerable to the claimant, there is no inducement to prescribe to him the

circuitry and expense of exceptions and appeals. The national liability being fixed, no judicial proceedings can diminish it. They may, indeed, enlarge, and doubtless would uniformly have that effect, inasmuch as the claimant could not except and appeal without incurring considerable costs, which either the Lords of Appeal or this Board would be bound to reimburse against the British government.

By sending the claimants, therefore, in a case of this kind, to the Lords, the treaty would have prejudiced one of the contracting parties and the claimants, without benefiting either ; and it is, of course, fair to presume that it had no such intention. If the words of the treaty necessarily purported such an intention, we should have then only to obey, whatever our opinion might be of its propriety ; but I have already shown that the words are so far from conveying any such meaning, that their natural interpretation leads to its reverse.

2d. I am also satisfied that judicial redress was unattainable against the captor.

As the seizure was made under an order of council, the captor could not be made to restore more than the property seized or its value. He was not liable for costs and damages, as the Lords of Appeal have uniformly determined, on analogous occasions.

Immediately upon the case getting into a train of judicial inquiry, the High Court of Admiralty ordered the cargo to be sold to his Majesty's go-

vernment, and the proceeds to be brought into court for the benefit of those who should appear to be entitled to them. The sale was made, (though upon no specific terms,) but the proceeds were not, and indeed *could not* be brought into court. The consequence was, that the property, for the restitution of which the captor might originally have been answerable, was, *by the act of the court in plain pursuance of the order of council*, placed out of his reach, and converted into a mere debt due from the British government to *whomsoever should appear to be entitled to it*.

I take it to follow undeniably, that the captor was no longer liable for the restitution of the *property itself*, since no court can be supposed capable of enforcing against a party that which it has, *by its own decree*, disabled him from performing.

It is only to be inquired then, whether he remained answerable to the claimants *for the value of the property?*

That value was the *proceeds*, and in ordinary cases he would doubtless have been answerable to that extent, *and to that only*. But in ordinary cases, where a sale is directed, the court *does* not prescribe to *whom* it shall be made; and such a sale always creates somewhere a *legal responsibility* for the purchase money, of which the captor may avail himself, so as to get in the proceeds to meet the court's decree.

In the present case the court departed from the ordinary mode, and directed the sale to be made

to his Majesty's government, (evidently in execution of the order of council,) over which neither the captor nor the Court of Admiralty, nor any other court, had or can have the least efficient control.

Upon the completion of the sale, then, the property was put beyond the power of the captor, and of judicial process; and as the proceeds were not paid into court, they too were equally beyond the arm of justice, exerting itself in the ordinary course of judicial proceedings. Nothing remained but an engagement on the part of the government to pay the proceeds to whomsoever should be entitled; but upon that engagement no judicial proceedings were competent to act. Its performance depended, not on the agency of judicial authority, but upon the pure discretion of the state.

In this state of things it is impossible to imagine that any decree could be procured, or if procured, executed against the captor, he being deprived of the goods with a view to which his liability commenced, and nothing being substituted in their place but the honorary promise of a sovereign power.

Accordingly we find, that in fact the Court of Admiralty has not made any decree against *him*, but that the decree actually made by it is wholly against the government. No far has it been from attempting to impose any burden upon the captor, in favour of the claimants, that it orders the

captor's as well as the claimants' costs to be paid by the state. It could decree in no other form, without violating its own established rules, and subverting every principle of law and equity. If it had decreed the captor to pay costs, damages, and expenses, it would have intrenched upon the settled rule, that the Orders of Council justified him; and if it had decreed him to restore the cargo, or to pay the value, or the proceeds, (such proceeds not being brought into court,) it would have made him responsible for unavoidable obedience to its own orders, (founded upon the Order of Council) by which he was compelled to part from the cargo, without receiving or having the means of enforcing payment of the value or the proceeds.

In no stage of the cause was it possible for the captor or the court to get possession of the proceeds by the instrumentality of any judiciary interference; and if, under these circumstances, a decree should pass against him to the extent of these proceeds, it is manifest that it would have been founded in gross iniquity, since, it would have been an attempt to coerce, or rather to influence the sovereignty of the nation, (the only party really bound to compensate the claimant,) by penalties upon an individual admitted by the tribunal inflicting them to be entirely innocent.

I will not presume, nor can I believe, that any Court of Judicature would proceed to an end, however just, by means so flagrantly oppressive.

It is no answer at all to say that the honour of the British government would not have permitted it to abandon the captor to the operation of the Admiralty sentence, without furnishing him with the means of complying with it. I do not question the national honour, for no one believes more highly of it than I do. But I may, notwithstanding, be permitted to suggest that a dependence upon it might have failed, and that whether it should fail or not, the result must have sprung from the mere pleasure of the government, and not from the operative power of the law.

Even if the Court of Admiralty or the Lords had (as I am thoroughly persuaded they would not) pronounced against the captor an absolute sentence to pay the proceeds, in a hope or upon a reliance that it would be discharged by the government before process was taken out upon it, yet if such hope or reliance should be disappointed, they could not have executed the sentence against him, without bringing upon the administration of Admiralty justice imputations, which I am confident it will never deserve.

So that, in any view in which this subject can be considered, the Court of Admiralty or the Lords could only proceed upon the *good faith* of the British government; and the whole question, at least, revolves itself into this:—"Is it a sufficient reason, under the 7th article of the treaty, for dismissing the claimants' case, that they did not persevere in a dilatory, expensive, and ruinous procedure, which, although obviously

incompetent to arrive, *by its own efficacy*, at the point relied upon by the treaty, and affording no *certain* prospect that it could even aid them in reaching that point at all, might possibly have *induced* the British government *voluntarily* to do them justice?" To this question there can be but one answer.

Before I dismiss this part of the subject, (upon which, perhaps, I have already dwelled too long,) I will subjoin some further observations to prove that the captor was not, on this occasion, *in any degree* liable to the claimants' remedy.

The Orders of Council, in virtue of which American vessels bound from the French West Indies to the United States, with the produce of those islands, were captured and taken in for adjudication, have (although revoked) been held to deprive the Lords of the power of adjudging against the captor the costs and damages accruing from the seizure. It is agreed on all hands, however, that there have been cases of capture under these orders, in which the neutral claimants were entitled to have costs and damages, if not against the captors, at least against the government of this country. We have been told that to afford compensation for these costs and damages was one of the principal objects, and, indeed, almost the only object of the 7th article of the treaty, and on one occasion we have unanimously granted compensation for them.

But if it be true that in the case of the *Nep-
tune*, the Lords of Appeal could have proceeded

against the British Government, through the sides of the captor (as has been contended) for the proceeds of her cargo, I cannot discover why they could not also have proceeded against the government in the same way, for the costs and damages above mentioned, but for which it seems we only have authority to grant redress.

The same sense of honour would, it is to be presumed, have influenced the government to interpose itself between the claimant and the captor, by paying out of its treasury the amount of the costs and damages decreed; and yet it never occurred to the Lords, that, upon the probability of that interference, they were justified in decreeing them against him.

Rather than accomplish, in this mode, the indemnification of the claimants, they have said, that, however well grounded his claim, he should have no costs and damages at all.

The force of this analogy will not be weakened by any suggestion, that the instances placed in comparison are different in their circumstances.

In both instances the captor's situation is *substantially* the same, so long as the government has not supplied him with the means of payment. He is equally innocent in both, and has in both precisely the same excuse, viz: *obedience to the orders of competent superiors*.

The orders of April 1795, under which the Neptune was seized, directed the *sale of the cargo to his Majesty's government, as well as the seizure of them*.

If the captor was not answerable for the consequences of one part of this order, (and we know that he was not,) why was he answerable for the consequences of the other, and if, in truth, he was not (out of his own funds) liable for the consequences of either, why is a decree or process against him personally to be used as the instrument of giving effect to the responsibility of the government in one case more than the other? These are distinctions which I confess myself unable to make,—and I have not found others who differ from me disposed to assist me in making them.

The nature of this order of council, and the proceedings upon it, show decidedly that the government alone was intended to be liable to the claimants.

It was an order from which the captor was to derive no benefit, and in the execution of which he was to acquire no interest that should create any correspondent liability, unless upon grounds entirely distinct from and out of it.

In the body of the order, it was declared that the cargoes were to be purchased by the state; and, accordingly, the Court of Admiralty always so decreed, except where government, in one or more instances, late in the year, gave permission to the claimants to sell to others.

The government, after becoming the purchaser, (not for any entire sum or at specific prices, as in common cases.) kept the supposed purchase-money in its own hands, and never placed it under

the control of the court. Of the cargoes it took possession immediately upon their coming into port, without waiting for the formality of Sir James Marriot's orders to sell.

The agency and influence of the government is visible and prominent in every step of the transaction. The sale was the obvious effect of its will. Even in the ascertainment of the compensation to be paid to the neutral owners, (although it is pretended that it was a proceeding in the ordinary course of justice,) the measure of redress was dictated by the state, and, as prescribed, applied.

In short, the whole affair was so plainly, and indeed confessedly, a mere political arrangement for the compulsory purchase by the British government of articles of provision from neutrals, that it seems wonderful how it can be imagined that a case, arising under it, was a case between captor and claimant in which the claimant was to look to the captor for the promised retribution.

Upon such a subject there needs no laboured argument.

I have thus stated the principal reasons upon which I have formed the opinion, "that it does sufficiently appear on this occasion, that the claimants could not, by the ordinary course of judicial proceedings, obtain, have, and receive adequate compensation for the loss and damage they are supposed to have sustained by the seizure complained of."

The jurisdiction of the Board being established, the rule by which compensation for the cargo should be estimated, came next into discussion.

The majority of the Board were for applying the rule adopted in the case of the *Betsey*, *Furlong*, i. e. "the nett value of the cargo at its port of destination, at such time as the vessel would *probably* have arrived there."

One of the British commissioners objected to the application of that rule, not only upon the general grounds mentioned in his written opinion in the case of the *Betsey*, *Furlong*, which I have elsewhere fully considered, but upon grounds peculiar to cases arising under the provision order of 1795.

The objections peculiar to this class of cases were chiefly founded upon the following positions:

1st. That the order of council was made when there was a prospect of reducing or bringing the enemy to terms by famine; and that, in such a state of things, provisions bound to the ports of the enemy became so far *contraband* as to justify Great Britain in seizing them upon the terms of paying therefor the invoice price, *with a reasonable mercantile profit thereon, together with freight, demurrage, &c.*

2d. That the order of council was justified by *necessity*—the British nation being at that time threatened with a scarcity of those articles directed to be seized.

The first of these positions has been rested not only upon the general law of nations, but up-

on the 18th article of the treaty between Great Britain and America.

The evidence of this supposed law of nations is principally the following loose passage of Vattel: "Commodities particularly used in war, and the importation of which to an enemy is prohibited, are called contraband goods. Such are military and naval stores, timber, horses, and even *provisions in certain junctures where there are hopes of reducing the enemy by famine.*" (Vattel, b. 3, c. 7, s. 112.)

It might be sufficient to say, in answer to this authority, that it is at least equivocal and indefinite, as it does not designate what the junctures are in which it shall be allowable to hold "that there are hopes of reducing the enemy by famine," that it is entirely consistent with it, to affirm that these hopes must be built upon an obvious and palpable chance of effecting the enemy's reduction by this obnoxious mode of warfare, and that no such chance is by the law of nations admitted to exist except in certain defined cases, such as the actual siege, blockade, or investment of particular places. This answer, satisfactory enough in itself, would be rendered still more so by comparing what is contained in the foregoing quotation with the more precise opinions of other respectable writers on the law of nations, by which we might be enabled to discover that which Vattel does not in this quotation profess to explain, the combination of circumstances to which his principle is applicable, or intended by him to be applied.

But there is no necessity for relying wholly on this answer, since Vattel will himself furnish us with a pretty accurate commentary on the vague text he has given us.

The only instance put by this writer, which comes within the range of his general principle, is that which he, as well as Grotius, has taken from Plutarch. Demetrius (as Grotius expresses it) held Attica by the sword. He had taken the adjoining towns of Eleusine and Rhamnus, *designing a famine in Athens*, and had almost accomplished his design, when a vessel laden with provisions attempted to relieve the city. Vattel speaks of this as of a case in which the provisions were *contraband* (Sect. 117;) and although he does not make use of this example for the declared purpose of rendering more specific the passage above cited, yet, as he mentions none other to which it can relate, it is strong evidence to show that he did not mean to carry the doctrine of special contraband, farther than the example will warrant.

It is also to be observed that in Sect. 113. he states expressly that all contraband goods, (including of course those becoming so by reason of the junctures of which he had been speaking at the end of Sect. 112,) are to be confiscated. But nobody pretends (and it would be monstrous to pretend) that Great Britain could rightfully have confiscated the cargoes taken under the order of 1795, and yet if the seizures made under that order fell within Vattel's opinion, the confiscation

of the cargoes seized would have been justifiable according to the same opinion.

It has long been settled that all contraband goods are subject to forfeiture by the law of nations, whether they are so in their own nature, or become so by existing circumstances ; and even in early times, when this rule was not so well established, we find that those nations, who sought an exemption from forfeiture, never claimed it upon grounds peculiar to any description of contraband, but upon general reasons, embracing all cases of contraband whatsoever.

As it is admitted, then, not only by the order itself, but by the agent of the crown, and every member of this Board, that the cargoes in question were not subject to forfeiture, as contraband, it is manifest that the juncture which gave birth to that order is admitted not to have been such an one as Vattel had in view, or in other words, that the cargoes were not become contraband at all within the true meaning of his principle, or within any principle known to the general law of nations.

In confirmation of the above observations upon Vattel, it may not be unimportant to add that Zouch,* who speaks upon this subject almost in the very words used by Vattel in the foregoing quotation, illustrates and fixes the extent of his general doctrine by the case of the investment of Athens by Demetrius.

* Bynkershoek too, who lays down his general principle even in larger terms than Vattel, evidently confines its application to cases of siege and blockade.

I have understood it to be supposed that Grotius also countenances the position I am now arguing against.

He divides goods into three classes, the first of which he declares to be plainly contraband, the second plainly not so, and as to the third, he says ; " In tertio illo genere usus ancipitis distinguendus " *erit belli status : nam si tueri me non possum* " *nisi que mittuntur intercipiam necessitas, ut* " *alibi exposuimus** jussabit, sed sub-onere restitutionis, nisi causa alia accedat." (lib. 3. c. 1. s. 5.) This "causa alia" is afterwards explained by an example, "ut si oppidum obsessum tenebam si portus clausos et jam deditio aut pax expectabatur."

This opinion of Grotius as to the third class of goods, does not appear to me to proceed at all upon the notion of contraband, but simply upon that of a pure necessity on the part of the capturing belligerent. He does not consider the right of seizure as a means of effecting the reduction of the enemy, but as the indispensable means of our own defence.

He does not authorize the seizure upon any supposed illegal conduct in the neutral, in attempting to carry articles of the 3d class, to the ports of the enemy, or upon any supposed character of contraband attached to those articles. He authorizes it upon the footing of that sort of absolute necessity on the part of the belligerent, making the seizure, which, by the law of nations, suspends in his favour, *sub modo*, the rights of others.

* Lib. 2. c. 2. s. 6. &c.

This necessity he explains at large, in lib. 2. c. 2 s. 6. &c., and in the above recited passage he refers expressly to that explanation.

1. "Videamus porro ecquod jus communiter
 "hominibus competat in eas res, quæ jam propriæ
 "aliquorum factæ sunt, quod quæri mirum forte
 "aliquis putet, cum proprietas videatur *absorpsisse*
 "jus illud omne, quod ex rerum communi statu
 "natebatur. Sed non ita est. Spectandum enim
 "est, quæ mens eorum fuerit qui primi dominia
 "singularia introduxerunt : quæ credenda est talis
 "fuisse ut quam minimum ab æquitate naturali
 "recesserit, Nam si scriptæ etiam leges in eum
 "sensum trahendæ sunt quatenus fieri potest,
 "multo magis mores qui scriptorum vinculis non
 "tenentur."

2. "Hinc primo sequitur, in gravissima ne-
 "cessitate reviviscere jus illud pristinum rebus
 "utendi, tanquam si communes mansissent : quia
 "in omnibus legibus humanis, ac *proinde* et in
 "lege dominii, summa illa necessitas videtur ex-
 "cepta." 3. "Hinc illud, ut in navigatione si
 "quando defecerint cibaria, quod quisque habet
 "in commune conferri debeat. Sic et defendendi
 "mei causa vicini ædificium orto incendio dis-
 "sipare possum : et funes aut retia discindere
 "in quæ navis mea impulsæ est, si aliter explicari
 "nequit. Quæ omnia lege civili non introduc-
 "ta, sed exposita sunt." Lib. 2, c. 2, s. 6.

In sections 7, 8 and 9, Grotius lays down the conditions annexed to the exercise of this right of necessity. As 1st, It shall not be exercised

until all other possible means have been used ; 2d. nor if the right owner is under a like necessity ; and 3dly, restitution shall be made as soon as practicable. Vide also lib. 3, c. 17, sect. 1.

Grotius exemplifies what he has said in the foregoing passages, thus, (sect. x,) “Hinc colligere est, quomodo ei, qui bellum pium gerit liceat locum occupare, qui situs sit in solo pacato ; nimirum si *non imaginarium, sed certum sit periculum*, ne hostis eum locum invadat, et inde irreparabilia damna det : deinde si nihil sumatur, quod non ad cautionem sit necessarium, puta, nuda loci custodia, relicta domino vero jurisdictione et fructibus : postremo, si id fiat animo rediendæ custodiæ simulatque necessitas illa cessaverit. ‘Enna aut malo, aut necessario facinore retenta,’ ait Livius, *quia malum hic, quicquid vel minimum, abit a necessitate*,” &c.

From these quotations it must be evident that Grotius, in the first mentioned passage, does not rely upon any principle similar to that which is attributed to Vattel, and that he does not hold the seizure of articles of the third class (among which provisions are included) *not bound to a port besieged or blockaded*, to be lawful when made with the mere view of *annoying or reducing the enemy*, but solely when made with a view to *our own preservation or defence*, under the pressure of that imperious and unequivocal necessity, which breaks down the distinctions of property, and upon certain conditions, revives the original right of using things as if they were in common.

In book 3, ch. 7, sect. 1, (*of neutrals in war*), this author, recapitulating what he had said before on this subject, further explains this doctrine of necessity, and most explicitly confirms the construction I have placed upon chap. 1, sect. 5. (Vide also Lee on Captures, p. 158, where the same construction is put upon Grotius.)

Rutherforth, in commenting upon lib. 2, c. 1, s. 5, also explains what Grotius there says of the right of seizing provisions upon the footing of necessity—and supposes his meaning to be that the seizure will not be justifiable in that view, “unless the exigency of affairs is such *that we cannot possibly do without them.*” (2d Ruth. p. 585.) And in commenting on lib. 3, c. 17, s. 1, he says, the necessity must be *absolute and unavoidable.* (Vide Ruth. p. 586.)

So far as Grotius considers the capture of articles of the 3d class as a means of *reducing the enemy*, he confines the right within very narrow limits;—for he supposes the trade of neutrals, in these articles, to be lawful even to a besieged or blockaded port, “*unless a surrender or a peace is quickly expected.*”

Instead of stating provisions to be contraband in any case, (other than those of siege or blockade,) he declares it to be the *duty of neutrals to supply both parties to the war with provisions*; (lib. 3, c. 17, s. 3;) and he places no other restriction upon this duty than that they are not to relieve the besieged.

I think that it may be confidently concluded, that this writer, in place of countenancing the orders of 1797, upon any idea of contraband, may be relied upon in that view as a strong authority against them.*

Every other writer on the law of nations, so far as has come within my observation, in treating upon the subject of contraband, limits the right of seizing goods, not generally contraband of war, (and provisions among the rest) to such cases as I have stated above.

Rutherforth, in a work of great merit, speaking particularly of the article of provisions, so confines this right. (2 vol. *Inst. Nat. Law*, p. 583.)

* Even if it were proved that the opinion of Grotius (*lib. 3, c. 1, s. 5*.) applied to the orders of 1795, the rule of compensation established by the majority of the Board would still be proper. For this writer tells us in the sections before quoted, as well as in the section which contains the opinion relied upon in favour of these orders, that when under the pressure and plea of necessity, we appropriate that which belongs to others, we must make restitution or compensation to the owner, and of course, we come again to the question in the case of the *Betsey*, *Furlong*, "ought not the compensation to be equal to the damage sustained?" Vattel, speaking of this right of necessity, and putting the same case with Grotius, has this passage. (*Vattel*; b. 3, c. 7, s. 122.) "Extreme necessity may even authorize the temporary seizure of a place, and the putting a garrison therein for defending itself against the enemy, or preventing him in his designs of seizing this place when the sovereign is not able to defend it. But when the danger is over, it must be immediately restored, paying all the charges, inconveniences, and damages caused by seizing the place." Burlamaqui's *Principles of Natural and politic Law*, vol. p. 1 Ruth. p. 85, and Lee on Captures to the same effect—see also 2 Ruth. 587, and Grotius, *lib. 3, c. 17, s. 1*.

Bynkershoek (whom I forbear to quote at large, since **Mr. Gore** has already done so) also so confines it.

Lee, *on Captures*, ch. 11 and 12, following **Bynkershoek**, upon a full consideration of the practice of nations, also so confines it; and he concludes his 12th chapter in these words, "From what has been said, it appears that the whole matter turns upon the place being besieged or not, as to the goods which are not contraband, (among which he reckons provisions,) or prohibited by treaty. Those which are so, being at all times during the war lawful prize, &c. *Postell. Specim. Jur. Marit. sect. 11*, has the same limitation.

See also in **Zouch**, and **Valin's Commentary** on the ordinances of **Louis the XIV.**, the same limitation.

It appears that, so far as the authority of the writers on the law of nations can influence this question, the orders of 1795 cannot be rested upon any just notion of contraband; nor can they in that view be justified by the reason of the thing or the approved usage of nations.*

* **Mr. Hammond's** justification of the provision order of 1793, to the American government seems to carry this principle to a still greater extent: for he says, in his letter to **Mr. Jefferson**, of the 12th of September, 1793, (covering a copy of those orders,) "that by the law of nations, as laid down by the most modern writers, it is expressly stated, that all provisions are to be considered as contraband, and as such liable to confiscation, in the

If the mere hope (however apparently well founded) of annoying or reducing an enemy by intercepting the commerce of neutrals in articles of provision, (which are no more contraband in themselves than common merchandise,) to ports not besieged or blockaded will authorize that interruption, I think it will follow, that a belligerent may at any time prevent (without a siege or blockade) *all trade whatsoever* with its enemy ; since there is at all times reason to believe that a nation having little or no shipping of its own may be so materially distressed, by preventing all other nations from trading with it, that such prevention may be a powerful instrument of bringing it to terms. The principle is so wide in its nature, that it is in this respect incapable of any boundary. One may reason upon it to the total annihilation of neutral commerce—~~or~~ rather it inevitably leads to that inadmissible result. There is no solid distinction, in the view of this principle, between provisions and a thousand other articles. Men must be clothed as well as fed ; and even the privation of the conveniences of life is severely felt by those to whom habit has rendered them necessary. Besides, a nation at war, in proportion as it can be debarred of its accustomed commercial intercourse with other states, must be enfeebled and impoverished, and if it is allowable

case where the depriving the enemy of those supplies, is one of the means intended to be employed for reducing him to reasonable terms of peace.”

to a belligerent to violate the freedom of neutral commerce in respect to any one article of trade, notoriously not contraband *in se*, upon the expectation or imagined practicability of annoying the enemy, or bringing him to terms by a seizure of that article, and preventing it from reaching his ports, why not upon the same expectation of annoyance (equally rational, and indeed more so) cut off, as far as possible, by captures, all communication with the enemy, and thus strike at once at his power and resources in a way which would not often fail of being effectual?

We know that, in the case of siege or blockade, there is no distinction between provisions and other articles of merchandise. The besieger may stop *all commodities* bound to the place besieged, and if this barbarous mode of hostility is admitted to extend itself beyond its ancient limits, I know not where it is to find others, which, while they leave *provisions* liable to seizure, shall exempt *other* commodities, not contraband in themselves, from a similar fate.

The principle in question, into whatsoever form it may be moulded, will not allow of such a restriction. It stands simply upon the *possibility of injuring or bringing an enemy to terms* by intercepting provisions on their way to his ports; or, as we find it in the letter which I have just mentioned in a note, "*Upon the intention of employing the seizure of provisions on their way to the ports of an enemy as the means of reducing him to reasonable terms of peace.*" Surely

if such a foundation be sufficient for this principle, it will always be lawful for a belligerent to do *any act whatsoever*, or commit depredations upon *any trade whatsoever*, provided it shall appear to be possible, by doing so, *to annoy or bring the enemy to terms*, or provided he shall only intend by doing so to *reduce the enemy to reasonable terms of peace*.

Hence this new rule of the law of nations would furnish a complete apology for the Dutch placart of 1630, by which they prohibited all commerce with Flanders, (doubtless with a prospect, and certainly with an *intention of injuring and bringing the enemy to terms, by enforcing* such a prohibition,) and for the convention between England and Holland, in the treaty of Whitehall, by which they agreed to prohibit all commerce with France, unquestionably with the same prospect and intention. Yet these attempts have been reprobated as lawless and oppressive by all the world; and in the last instance, upon a counter treaty being entered into between Sweden and Denmark, in 1693, for maintaining their rights and procuring just satisfaction, the parties to the convention (says Vattel) perceiving that the complaints of the two crowns were well grounded, did them justice.

• It is true indeed, that these attempts were not made with any reference to the new-found principle; for it was not then supposed to exist.

Those who struck so deeply at the commerce of Europe, in 1630 and 1689, seem to have believed that they could only lend a colour to their

enterprize by pretending that they *had blockaded*, or *intended to blockade* the ports of their enemies. The pretence was manifestly frivolous; but it would appear to be at least as well founded as the vague allegation of a *hope*, or *prospect*, or *intention of reducing such a country as France by famine*.

In a word, if a belligerent is empowered by the law of nations to seize the property of neutrals upon its own terms, whensoever that belligerent shall believe, or affect to believe that by such means its enemy may be annoyed or reduced, few nations would choose to remain neuter. A state of war would be infinitely preferable to such a state of neutrality. I say, "affect to believe,"—because the principle now contended for is liable to be thus abused. Who is to be the judge when there exists a *prospect of reducing the enemy* by violating the acknowledged liberty of commerce? If the belligerent is not to be himself the judge, at least in the first instance, the principle is an idle one, and means nothing; and, if he is to be the judge, it follows that the principle is more than an idle one, and will be applied in practice upon false as well as mistaken grounds. What standard have neutral nations to refer to, for the purpose of ascertaining the abuse of this limitless discretion? The standard of siege or blockade is deserted—and what can we substitute in its place but speculative calculations upon probabilities which will be as various as the interests, the hopes, and the inclinations of those who make them, and never can present a certain result until after they

have been acted upon ? It is upon this ground, among others, that modern writers on the law of nations reject the idea of Grotius, that all trade to a place besieged or blockaded is lawful, *unless a surrender or a peace is quickly expected.*

Without professing to enter into much detail upon this occasion, the foregoing considerations appear to me to prove satisfactorily, that the orders of 1795 cannot, in the light in which I am now considering them, be justified or excused.*

* Even if the general position stated by Vattel be admitted in the utmost possible latitude, still it would not follow that provisions belonging to neutrals, and bound to France, could rightfully be seized, as the orders of 1795 directed. Before articles not contraband *in se* can be seized, even when bound to a besieged or blockaded port, the person attempting to carry them there must be apprised of such siege or blockade, and it is only in his persisting in his efforts to supply the place after such knowledge that his cargo becomes liable to seizure. In what way a neutral is to be informed of the hope or prospects of one belligerent of reducing the other by famine, or of its intentions of resorting to the stoppage and seizure of all provisions bound to the enemy, as a means of reducing him to terms, I know not, unless it be from the declarations of that belligerent : but we may, I think, safely assume that it is indispensable that he should have this information before his cargo of provisions on its way to the ports of the enemy, not besieged or blockaded, can be taken upon any terms of contraband. In cases of seizure under the orders of 1795, the American traders had no information of this sort. Great Britain had made no declaration amounting to a notice of its hopes, prospects, or intentions in this particular ; and how otherwise a neutral could obtain a knowledge of them, it is not easy to conjecture. The orders themselves were not made public. They were mere secret instructions to commanders of armed vessels, and were not even sent to the Court of Admiralty

It is now to be seen whether the 18th article of the treaty gives any sanction to those orders.

as is usual. Even now it is found impracticable to procure a copy of them, although of every other order issued during the war copies have been easily procured. The provision order of 1793 (which was made public) contained an alternative, that the vessel stopt might (upon giving security) proceed upon her voyage to the ports of any country in amity with his Majesty. This, to be sure, was little more than a nominal alternative; but it does not appear that the orders of 1795 contained any alternative at all. How can it be imagined that the absolute and unconditional seizure of these provisions-cargoes could be lawful upon the footing of contraband, when those who were conveying these cargoes to France had not and could not have the least information of the hopes, &c. of Great Britain, of reducing that country by famine? They could not collect such hopes, &c. from any facts known to them; for in truth there was not any state of things to produce a rational prospect of that sort; and indeed it may well be doubted whether there can be such a state of things in a country like France. To starve a single town or fortress is practicable, because it cannot raise provisions to supply itself, and because it may be sufficiently prevented from receiving supplies from without; but the fertile soil, the extensive territories and sea coasts of France, would seem to fix upon an attempt to treat it like a town or garrison, the character of wild and chimerical.

At any rate, there must be a concurrence of circumstances, which have not happened in that country during the present war, to authorize the prospect in question.

If the orders of 1795 are to be considered as an experiment on this subject, (and we are told that they are,) that experiment has proved the rashness of the hope; but in fact these orders made no experiment which has not been already made by those of 1793 under circumstances equally, if not more favourable to such an enterprise. I believe the truth to be, that Great Britain intended by the orders of 1795 to supply its own wants, and had no expectation of making them instrumental in the reduction of the enemy.

Upon this part of the case, I shall content myself with transcribing the observations of a writer of the first eminence in America,* published while the treaty was under discussion there. It will not be necessary to subjoin more than a few reflections of my own, because it happens that the topics now urged at the Board, in reference to this article, are in substance the same with those which occurred to the enemies of the treaty in the United States, and are consequently considered and (in my judgment satisfactorily refuted) in the number of that publication which I am about to quote.

Indeed, it may safely be asserted, that if these objections had not been believed in America to be totally groundless, we should not now be sitting here in the character of commissioners.

Nº. XXXII.—Of *Camillus*.

“The 18th article of the treaty, which regulates the subject of contraband, has been grievously misrepresented—the objections used against it, with most acrimony, are disingenuous and unfounded,” &c.

“The most laboured, and at the same time the most false of the charges against the 18th article of the treaty is, *that it allows provisions to be be contraband in cases not heretofore warranted by the laws of nations, and refers to*

* General Hamilton.

“ *the belligerent party the decision of what these cases are.* This is the general form of the charge. “ The draft of a petition to the legislature of Virginia reduces it to this shape—the treaty expressly admits “ ‘provisions are to be held contraband in cases other than when bound to an “ ‘invested place, and impliedly admits that such “ ‘cases exist at present.’ ”

“ The first is a palpable untruth, which may be detected by a bare perusal of the article. The last is an untrue inference, impregnated with the malignant insinuation, that there was a design to sanction the unwarrantable pretension of a right to *inflict famine on a whole nation.*

“ Before we proceed to an analysis of the article, let us review the prior situation of the parties.”

“ Great Britain it is known had taken and acted upon the ground that she had a right to stop and detain, on payment for them, provisions belonging to neutrals going to the dominion of France. For this violent and impolitic measure, which the final opinion of mankind will certainly condemn, she found colour in the sayings of some writers of reputation on public law.”

“ A passage of this kind from Vattel, has been more than once quoted in these terms, ‘Commodities,’ &c. Heineccius* countenances the

* I have examined Heineccius, and find that he ranks provisions among the articles generally contraband of war, for which

“opinion, and even Grotius seems to bear towards it.

“The United States with reason disputed this construction of the law of nations restraining the general propositions, which appear to favour it, to those cases in which the chance of reducing the enemy by famine was manifest and probable, such as the cases of particular places *bona fide* besieged, blockaded, or invested. The government accordingly remonstrated against the proceedings of Great Britain, and made every effort against it, which prudence in the then posture of affairs would permit. The order for seizing provisions was after a time revoked, (i. e. the order of 1793. W. P.)

“In this state our Envoy found the business, pending the very war in which Great Britain had exercised the pretension, with the same administration which had done it; was it to be expected that she would in a treaty with us even virtually or impliedly have acknowledged the injustice or impropriety of the conduct? &c. &c.

“On our side, to admit the pretensions of Great Britain was still more impossible. We had every inducement of character, right, and interest against it. What was the natural and

he cites Bynkersh. c. 9, and Grotius, lib. 3, c. 17, s. 3. It need not be stated that these writers prove the reverse of this, and that the reverse of it is universally admitted. Indeed, the 18th article expressly admits the reverse of it. W. P.

“ only issue out of this embarrassment ? Plainly
 “ to leave the point unsettled, to get rid of it, to
 “ let it remain substantially where it was before
 “ the treaty. *This I have good ground to believe,*
 “ was the real understanding of the two negotia-
 “ tors, and the article has fulfilled that view.

“ After enumerating specifically what articles
 “ shall be deemed contraband, it proceeds thus,
 “ ‘ and whereas the difficulty of agreeing on the
 “ ‘ *precise cases* in which alone *provisions and*
 “ ‘ *other articles*, not generally contraband, may
 “ ‘ be regarded as such, renders it expedient to
 “ ‘ provide against the inconveniences and mis-
 “ ‘ understandings which might there arise : It is
 “ ‘ further agreed that whenever any such arti-
 “ ‘ cles, so becoming contraband, according to the
 “ ‘ *laws of nations*, shall for that reason be seiz-
 “ ‘ ed, the same shall not be confiscated, but the
 “ ‘ owners thereof shall be speedily and complete-
 “ ‘ ly indemnified ; and the captors, or, in their
 “ ‘ default, the government under whose authority
 “ ‘ they act, shall pay to the masters or owners of
 “ ‘ such vessels the full value of all the articles
 “ ‘ with a reasonable mercantile profit thereon,
 “ ‘ together with the freight, and also the demur-
 “ ‘ rage incident to such detention.’ ”

“ The difficulty of agreeing on the precise
 “ cases in which articles not generally contraband
 “ become so from particular circumstances, is ex-
 “ pressly assigned as the motive to the stipulation
 “ which follows.

"This excludes the supposition that any cases
 "whatever were intended to be admitted, or
 "agreed. But this difficulty rendered it expedient to provide against the inconveniences and
 "misunderstandings, which might thence arise ;
 "a provision with this view is therefore made,
 "which is that of a liberal compensation for the
 "articles taken. The evident intent of this provision is, that in doubtful cases, the inconveniences of the neutral party being obviated or
 "lessened by compensation, there may be the less
 "cause or temptation to controversy and rupture, and the affair may be the more susceptible of negotiation and accommodation. More
 "than this cannot be pretended, because the
 "agreement is, 'that, whenever any such articles, so become contraband according to the
 "existing laws of nations, shall for that reason be
 "seized, the same shall not be confiscated, but
 "the owners, &c."

"Thus the criterion of the cases in which articles, not generally contraband, may from particular circumstances become so, is expressly
 "the *existing law of nations*, in other words the
 "existing law of nations at the time the transaction happens. When these laws pronounce
 "them contraband, they may for that reason be
 "seized ; when otherwise, they may not be seized. Each party is as free as the other to decide whether the laws of nations do, in the given
 "case, pronounce contraband or not, and neither

"is obliged to be governed by the opinion of the
 "other. If one party, on a false pretext of being
 "authorized by the law of nations, makes a
 "seizure, the other is at full liberty to contest it,
 "to appeal to those laws, and if he thinks fit, to
 "oppose even to reprisals and war. This is the
 "express tenor of the provision; there is nothing
 "to the contrary; nothing that narrows the ground,
 "nothing that warrants either party in making a
 "seizure which the laws of nations, independent
 "of the treaty, do not permit; nothing which
 "obliges either party to submit to one, when it is
 "of opinion that the law of nations has been vio-
 "lated by it."

"But as liberal compensation is to be made in
 "every case of seizure whereof difference of opi-
 "nion happens, it will become a question of pru-
 "dence and expediency whether to be satisfied
 "with the compensation, or to seek further re-
 "dress. The provision will in doubtful cases
 "render an accommodation of opinion the more
 "easy, and, as a circumstance conducing to the
 "preservation of peace, is a valuable ingredient
 "in the treaty. A very different phraseology
 "was to have been expected, if the intention had
 "been to leave each party at full liberty to seize
 "*agreeably to its own opinion of the laws of na-*
 "*tions*, upon the condition of making compen-
 "sation. The stipulation would not then have
 "been. "It is agreed that whenever either of
 "the contracting parties shall seize any such ar-

“ ‘tacles so becoming contraband.’ ” This makes
 “ not the *opinion of either party*, but the fact of
 “ the articles having become contraband by the
 “ laws of nations, the condition of the seizure.

“ A cavil has arisen on the term ‘existing,’ as
 “ if it had the effect of enabling one of the par-
 “ ties to make a law of nations for the occasion.*
 “ But this is mere cavil. No one nation can make
 “ a law of nations, no positive regulations of one
 “ state, or of a partial nomination of states, can
 “ pretend to this character. A law of nations is
 “ a law which nature, agreement, or usage has es-
 “ tablished between nations; as this may vary
 “ from one period to another, by agreement or
 “ usage, the article very properly uses the term
 “ ‘existing’ to denote that law which, at the time
 “ the transaction may happen, shall be then the
 “ law of nations. This is a plain and obvious
 “ use of the term, which nothing but the spirit of
 “ misrepresentation could have perverted to a
 “ different meaning.”

“ The argument against the foregoing construc-
 “ tion is in substance this : It is now a settled doc-
 “ trine of the law of nations, that provisions and
 “ other articles, not generally contraband, can ea-
 “ sily become so when going to a place besieged,
 “ blockaded or invested. Cases of this kind are fully

* This has not been urged at the Board on this occasion, but
 in the case of the *Betsey*, Furlong, Mr. Gostling's objection to the
 jurisdiction amounts to it. W. P.

“ provided for in a subsequent part of the article ;
 “ the implication, therefore, is that something
 “ more was intended to be embraced in the ante-
 “ cedent part.”*

“ Let us first examine the fact whether all the
 “ cases of that kind are comprehended in the
 “ subsequent part of the article—I say they are
 “ not. The remaining part of the clause divides
 “ itself into two parts. The first describes the
 “ case of a vessel sailing for a port or place be-
 “ longing to an enemy, without knowledge that
 “ the same is either besieged, blockaded, or in-
 “ vested and provides that, in such a case, the
 “ vessel may be turned away, but not detained,
 “ nor her cargo, if not contraband, confiscated,
 “ unless after notice she shall again attempt to
 “ enter. The second describes the case of a ves-
 “ sel or goods which had entered into such port
 “ or place before it was besieged, &c. ; and de-
 “ clares that neither the one nor the other shall be
 “ liable to confiscation, but shall be restored to
 “ the owners thereof. These are the only cases
 “ described or provided for. A third, which oc-
 “ curs on the slightest reflection, is not mentioned.
 “ The case of a vessel going to a port or place
 “ which is besieged, blockaded, or invested, with
 “ notice of its being in that state when she com-

* This argument at the Board, stood thus :—cases relative to
 siege, &c., are fully provided for in the latter part of the article,
 and, therefore, the former part is intended to embrace something
 more.

“ mences her voyage, or previous to her receiving notice from the besieging, blockading, or investing party. This is left to the operation of the general law of nations, except so far as it may be affected in respect to compensation by the antecedent clause. Thus the fact which is the foundation of the argument fails, and with it of course—the argument itself.

“ But had this been otherwise, the conclusion would still have been erroneous. The two clauses are entirely independent of each other, and though they might both contemplate the same cases in the whole or in part, they do it with an eye to very different purposes.”

“ The object of the first is to lessen the danger of misunderstanding, by establishing this general rule, that whenever articles not generally contraband, become so from particular circumstances according to the law of nations, they shall still not be confiscated, but when seized the owners of them shall be indemnified.”

“ The object of the last is to regulate some special consequences with regard to vessels and goods going to, or which had previously gone to, places besieged, blockaded, or invested ; and in respect to which, the dispositions of the laws of nations may have been deemed doubtful or too rigorous. Thus it is held, that the laws of nations permit the confiscation of ships and goods going to places besieged, blockaded, or invested ; but this clause decides that if going without notice, so far from being confiscated

“ they shall not even be detained, but shall be
 “ permitted to go whithersoever they please. If
 “ they persist after notice, then the contumacy
 “ shall be punished with confiscation. In both
 “ instances, the consequence is entirely different
 “ from every thing in the antecedent clause. There
 “ then is seizure with compensation. Here, in
 “ one instance, seizure is forbidden, and permis-
 “ sion to go elsewhere is enjoined. In the other in-
 “ stances, the offending things are confiscated,
 “ which excludes the idea of compensation.
 “ Again, the last part of the last clause stipulates,
 “ in the case which it supposes, the restoration of
 “ the property to its owners, and so excludes both
 “ seizure and compensation. Hence it is appa-
 “ rent that the objects of the two clauses are en-
 “ tirely foreign to each other, and that no argument
 “ or inference whatever can be drawn from the
 “ one to the other.”

“ If it be asked what other cases there can be,
 “ except those of places besieged, blockaded, or
 “ invested? and if none other, what difficulty in
 “ defining them? and why leave the point so vague
 “ and indeterminate? One answer, which, in-
 “ deed, has already been given in substance, is,
 “ that the situation of one of the parties prevent-
 “ ed an agreement at the time; that not being able
 “ to agree, they could not define, and the alterna-
 “ tive was to avoid definition. The want of defi-
 “ nition only argues want of agreement. It is
 “ strange logic that this or that is admitted be-
 “ cause nothing is defined!”

" Another answer is, that even if the parties had
 " been agreed that there were no other cases than
 " those of besieged, blockaded, or invested places,
 " still there would have remained much room for
 " dispute about the precise cases, owing to the
 " impracticability of defining what is a besieged,
 " blockaded, or invested place. About this there
 " has been frequent controversy ; and the fact is
 " so complicated, and puts on such a variety of
 " shapes, that no definition can well be devised
 " which will suit all. Thence nations, in their
 " compacts with each other, frequently do not at-
 " tempt one ; and, where the attempt has been
 " made, it has left almost as much room for dis-
 " pute about the definition, as there was about
 " the thing."

" Moreover, is it impossible to conceive other
 " cases than those mentioned above, in which pro-
 " visions and other articles not generally contra-
 " band might, on rational grounds, be deemed so ?
 " What if they were going expressly, and with no-
 " tice to a besieged army, whereby it might ob-
 " tain a supply essential to the success of its ope-
 " rations ? Is there no doubt that it would be jus-
 " tifiable in such case to seize them ? Can the
 " liberty of trade be said to apply to any instance
 " of *direct and immediate aid to a military ex-*
 " *pedition* ? It would be at least a singular effect
 " of the rule, if provisions could be carried without
 " interruption, for the supply of a Spanish army
 " besieging Gibraltar, when, if destined for the

“supply of the garrison in that place, they might
“of right be seized by a Spanish fleet.

“The calumniators of the article have not had
“the candour to notice that it is not confined to
“*provisions*, but speaks of *provisions and other*
“*articles*. Even this is an ingredient which com-
“bats the supposition that countenance was to be
“given to the pretensions of Great Britain with
“regard to provisions which, depending on a rea-
“son peculiar to itself, cannot be deemed to be
“supported by a clause including other articles
“to which that reason is entirely inapplicable.”

“There is one more observation which has
“been made against this part of the article, which
“may deserve a minute’s attention. It is this,
“that although the true meaning of the clause be
“such as I contend for, still the existence of it af-
“fords to Great Britain a pretext for abuse, which
“she may improve to our disadvantage. I an-
“swer, it is difficult to guard against all the per-
“versions of a contract which ill faith may sug-
“gest. But we have the same security against
“abuses of this sort, that we have against those of
“other kinds, the right of judging for ourselves,
“and the power of causing our rights to be re-
“spected. We have this plain and decisive re-
“ply to make to any uncandid construction which
“Great Britain may at any time endeavour to
“raise. ‘The article pointedly and explicitly
“‘makes the existing law of nations, the stan-
“‘dard of the cases in which you may rightfully
“‘seize provisions and other articles, not gene-

“ rally contraband. This law does not authorize the seizure in the instance in question ; you have consequently no warrant under the treaty for what you do.”

“ The same disingenuous spirit, which tinctures all the conduct of the adversaries of the treaty, has been hardy enough to impute to it the last order of Great Britain to seize provisions going to the dominions of France.”

“ Strange ! that an order issued before the treaty had ever been considered in this country, and embracing the other neutral powers besides the United States should be represented as the fruit of that instrument ! The appearances are, that a motive no less imperious than that of impending scarcity has great share in dictating the measure, and time I am persuaded will prove *that it will not even be pretended to justify it by any thing in the treaty.*”

In this last persuasion it appears that this writer has been mistaken ; but his inducements to adopt it will hardly fail to convince those who shall be disposed to examine them with candour, that, although the persuasion has not been countenanced by the event, it will not be brought into discredit by it.

There is one topic which the 18th article of the treaty has produced at the Board, upon which Camillus has not observed, and upon which I shall, of course, bestow some slight consideration.

That article says, that the owners of the cargoes becoming contraband by the laws of nations, and

for that reason seized, shall be *speedily and completely indemnified*.

It is argued that, as the article goes on to express the understanding of the contracting parties as to the import of the terms *completely indemnified*, by prescribing a rule for the attainment of complete indemnification, we have here a precise commentary upon the words "full and complete compensation," used in the seventh article of the treaty.

The rule is, "the value of the cargoes and a reasonable mercantile profit, with freight," &c.

I shall not trouble myself to inquire into the exact scope of this rule,—nor shall I occupy myself with an inquiry whether the words *indemnification and compensation* are so far synonymous as that we should be justified in taking the sense of the contracting parties upon the import of the former, as conclusive evidence of the import of the latter. For, surely, a rule which should completely indemnify or compensate the owner of goods become contraband, and for that reason *rightfully taken from him by the laws of nations*, might still be wholly inadequate to the complete compensation of the owners of a cargo *wrongfully captured or condemned*.

The term complete *indemnification or compensation* depends, for its scope and for the rule which shall attain it, upon the nature of the case to be redressed. We are required by the VIIth article, in all cases to grant "complete compensation," where we grant any thing—but

do we apply the same rule in every case ? or do we not rather understand by "complete compensation" that retribution which is commensurate with the injury received ?

In short, it can never be satisfactory to abstract the words "complete indemnification" in the 18th article from the subject to which they are applied, and then, reasoning upon their abstract meaning, to draw an inference from them that shall affect an entirely different subject. There is not a member of this Board who has heretofore acted upon this idea. We have all agreed that in granting "complete compensation" we are, not always obliged to give freight or demurrage ; but the rule in the 18th article gives freight and demurrage universally ; and if that rule is proper for our government at all, we must adopt it uniformly, for we are compelled to grant complete compensation in every instance in which it is proper, for us to relieve. This absurdity would follow, that we should apply the same measure of redress to cases wholly different in principle, and, instead of suiting the compensation to the injury under all its circumstances, should treat alike a claimant whose case was liable to no exception, and one whose case was attended with such facts as not only to warrant the original capture for the purpose of judicial investigation, but to destroy the equitable claim to freight and all title to demurrage.

2dly. We are next to inquire whether these orders were justified by necessity, Great Britain be-

ing as alleged at the time of issuing them threatened with a scarcity of those articles directed to be seized.

I shall not deny that *extreme necessity* may justify such a measure. It is only important to ascertain whether that *extreme necessity* existed on this occasion, and upon what terms the right it communicated might be carried into exercise.

We are told by Grotius, that the necessity must not be imaginary—that it must be real and pressing, and that even then it does not give a right of appropriating the goods of others until all other means of relief, consistent with the necessity, have been tried and found inadequate. Rutherford, Burlamaqui, and every other writer who considers this subject at all, will be found to concur in this opinion.

No facts are stated to us by the agent of the crown, from which we might be justified in inferring that Great Britain was pressed by necessity like this—or that, previous to her resorting to the orders of council, other practicable means were tried for averting the calamity she feared. It is not to be doubted that there were other means. The offer of an advantageous market, in the different ports of the kingdom, was an obvious expedient for drawing into them the produce of other nations. Merchants do not require to be forced into a profitable commerce. They will send their cargoes where interest invites, and if this inducement is held out to them in time, it will always produce the effect intended.

But so long as Great Britain offered less for the necessities of life than could have been obtained from her enemy, was it not to be expected that neutral vessels should seek the ports of that enemy and pass by her own? Can it be said that under the apprehension (not under the actual experience) of scarcity, she was authorized to have recourse to the forcible seizure of provisions belonging to neutrals, without attempting those means of supply which are consistent with the rights of others, and which were not incompatible with the exigency?

After these orders had been issued and carried into execution, the British government did what it should have done before. It offered a bounty upon the importation of the articles of which it was in want. The consequence was, that neutrals came with these articles, until at length the market was found to be overstocked. The same arrangement, had it been made at an earlier period, would have rendered wholly useless the orders of 1795.

I do not undertake to judge, for I have no sufficient data upon which to judge, whether at the time of issuing these orders, there was, or was not, reasonable ground for apprehending that sort of scarcity which produces severe national distress, or national despondency, unless extraordinary measures were taken for preventing it.

But it will not admit of a question, that there was no ground for apprehending that such a calamity would happen, *unless the government re-*

sorted to depredations upon neutral trade, and seized by violence the property of its friends.

That such a resource should not be placed in the front of the expedient for warding off an evil like this, seen only in perspective, is too plain for argument.

I do not desire, on this occasion, to determine more than is necessary to the formation of a correct judgment upon the case before us: and hence it is that I content myself with the limited view I have here taken of this part of the subject.

Let it now be supposed that the alleged necessity was such as warranted the orders of 1795, and the seizure under them. How does this vary the rule of compensation? Upon this supposition no more will be proved, than that Great Britain might by force assume the pre-emption of the articles in question; but can it be imagined that she could assume this pre-emption upon any other terms than giving to the neutral as much as he could have obtained from those to whom he was carrying them?

Great Britain might be able to say to neutrals, "you shall sell to us;" but does it follow that she could also say, you shall sell to us upon worse terms than you would have procured elsewhere in the lawful prosecution of your commerce?

The authorities already cited in a note will answer these questions satisfactorily.

Grotius, lib. 2, c. 2, s. 6, &c.—lib. 3, c. 1, s. 5, c. 17, s. 1. &c.—1 Ruth. 85, and Burlemaqui—

Vattel, b. 3, c. 7, s. 122—1 Ruth. 405—2 Ruth. 586, 7.

But upon such a subject neither authorities nor arguments can be required.

WM. PINKNEY.

LONDON, 25th June, 1797.

THE MOLLY—*Young*.

MR. PINKNEY.—The information given to the Board, by Joshua Johnson, Esq., in relation to this case, has satisfied me that the memorial ought to be dismissed.

But for that information, I should think the claimants entitled to demurrage.*

27th Feb. 1797.

WM. PINKNEY.

* It may be necessary to add, by way of explanation, that the demurrage above alluded to is not on account of the detention of the vessel, *for the purpose of giving effect to the captor's right to the cargo*, but on account of her detention, *when it was no longer necessary in reference to the cargo*, and when the object of it was solely the vessel herself.

The papers, both false and true, and all the evidence in the cause, concurred in showing the property of the vessel to be as claimed; and, but for the information of Mr. Johnson, I should have determined that inquiry into that property, after such a concurrence of testimony, was unreasonably protracted, and that much of the intermediate detention, from the appearing of that testimony until the decree for restitution was wrongful.

The capture was on the 8th of August, 1793. The cargo was condemned 2d of May, 1794, but the vessel was not restored un-

THE SALLY—*Choate, Master.*

MR. PINKNEY.—I am of opinion, 1st. That the claimants are entitled to the costs below, to damages and demurrage. 2d. That they are entitled to the costs of appeal, and to be reimbursed such costs as were adjudged against them to the captors.

There was no probable cause of seizure or detention.

The orders of the 6th November 1793, relied upon in the respondent's printed case, might have exoused the captor in a controversy between him and the claimants, but can have no weight in a question between the claimants and the British government under the treaty. The complaint is now to be considered independent of those orders.

According to Vattel, credit should have been given to the ship's papers produced by the neutral master at the time of the capture, *unless any fraud appeared in them, or there were very good reasons for suspecting their validity.*

1st. The ship's papers upon the face of them bore no marks of fraud, and afforded no reason at all to justify a doubt of their validity and fairness.

til the 5th of July following—although no new lights were thrown upon the property of the vessel.

This explanation is made long after the filing of the foregoing opinion, the inexplicit nature of which did not sooner strike me. In fact, it is only inexplicit to those who are not acquainted with the circumstances of the case in which it was filed. W. P.

The want of formal bills of lading could not affect their credit, as there were papers on board in substance equivalent to them.

Invoices to which the master's acknowledgments were subjoined, stating explicitly for whose account the goods were shipped, and engaging to follow the shippers' instructions by which they were accompanied, and to which they refer, answered every object for which bills of lading are calculated.

The invoices, acknowledgments and instructions, taken together, formed a body of clear and unequivocal evidence of the ownership of the cargo, its place of destination, the person to whom it was consigned, and the manner in which the proceeds were to be disposed of. Bills of lading could not have done more, nor indeed so much; and if in point of *information*, they would at most have been barely equal to these documents, in point of *law* they could not in any respect lay claim to superior efficacy.

Indeed, as the whole cargo was consigned to the master on board, the manner in which it was documented was better suited to the nature of the transaction than bills of lading in the customary form. An engagement on the part of the master to deliver the cargo to *himself* upon his arrival in port, could hardly be so proper as an engagement to follow the instructions of the consignors either endorsed upon or accompanying the invoice.

It is alleged in the printed case of the respondents that there is in this respect an *irreconcilable*

inconsistency between the letter of instructions from the ship owners to the master and the other papers relative to the cargo. It is true that this letter does direct the master to take his freight for goods not shipped on their account, *according to bills of lading*, but it is so obvious that this was mere inaccuracy, that it ought not to have been mentioned as a rational ground of suspicion. The instructions of those who shipped the goods on freight prove universally that there was no bill of lading signed for them; for they refer to an invoice and to that only; which invoice, having the master's acknowledgment and engagement as above stated, subjoined together with the freighters' instructions therein referred to *endorsed*, was, to every purpose of law or explicitness, equal to a bill of lading, and might well have been called so by the ship-owners (putting inadvertence out of the question) without hazarding the credit of the ship's papers with those who should be disposed to place upon them a just and liberal construction.

But surely if a bill of lading was purposely omitted with dishonest views, the same views would have induced the ship-owners to say nothing about bills of lading in their instructions to the master, which doubtless were not intended for concealment.

If bills of lading were actually signed, but meant to be concealed from British or other cruizers, for fraudulent purposes, it was the perfection of stupidity to refer to them in that very paper which

was sure to come under the inspection of those against whom the fraud was meditated. If it was designed to carry on a fraud by means of showing false papers, and concealing true ones, what reason can be imagined why the master should not have signed and taken with him *false bills of lading*, as well as receive on board, as instruments of deception, *false and colourable invoices*, to which he made himself a party as effectually as he could be to bills of lading? There can be no reason, unless we suppose that fraud consults form in what it intends to keep out of sight, but neglects it altogether in what it fabricates, as the only means of imposition, that it is scrupulously technical when it is of no use to be so, but is slovenly and negligent when its own object prescribes to it a nice attention to regularity and accuracy. He who adopts such a supposition must reject all experience. In short, the objection appears to be manifestly captious.

It is further objected by Mr. Gosling, that the master's pretence of the vessel's destination from Rochelle to Amsterdam is contradicted by the letter of instructions from the ship-owners, &c. If we are to take the letter of instructions without the postscript under the same date, this allegation is true. But why it is that we are to reject the postscript, (which expressly authorizes the destination to Amsterdam,) it would have been well for the objector to have explained.

2d. If (as I hold to be most clear) the papers on board were free from any imputation upon the

face of them, it is to be considered whether the preparatory examinations furnished any thing upon which to impeach them.

The law of nations requires that a belligerent making prize of a neutral, in the teeth of proper written documents, shall have *very good reasons* for his conduct. The reason in this case (even admitting it to have been known to the captor at the time of the seizure, which is not at all likely) was simply that Anduze, a Frenchman, who happened to be, among others of his countrymen, a passenger on board the Sally from America to France, did not, as the others did, leave the ship at Rochelle, but was proceeding in her to Amsterdam. That he had no interest in, or control over the cargo, appeared from the ship's papers, and (if the captor made any inquiries on the subject without which he could have known nothing of this alleged probable cause) it must also have appeared from the declarations of the master, mate and Anduze.

It was, however, *possible* that, notwithstanding these papers and declarations, Anduze *might be* interested in the ship or cargo, or both; and if the *possibility* of such an interest be a *very good reason* for distrusting the papers. &c. then, and then only, had the captor probable cause of seizure on this occasion. But possibility is not probable cause. There must be an apparently well-founded presumption. The presumption, here relied upon, was that Anduze would have landed at Rochelle, if interest had not attached him to the

ship; but this was an arbitrary and fanciful presumption—a mere *surmise*, rested upon the selection of one motive out of many, all of them equally, and some of them infinitely more, probable.

Anduze had been for many years an inhabitant of America, and the West Indies, and, of course, had been in no situation to calculate with certainty how far a residence in France would suit his views in life, his political opinions, or the part he might have acted previous to his arrival. It was not practicable for him even to ascertain whether he could be in safety there, during that turbulent æra of the Revolution. At Rochelle he might be enabled to make this estimate more conclusively—and the result may be supposed to have been a conviction that it would be more prudent to go on to Holland. Rochelle too was at that time in a state of much disturbance, as appears by the proof, and this might have influenced him to prefer proceeding with the vessel. In short, without enumerating them, it must be evident that various causes, in no shape connected with the Sally or her cargo, might have induced him to re-embark, and as the fact was thus fairly attributable to so many strong and probable reasons consistent with the ship's papers, and the declarations of the captured, if the captor would persist in carrying the vessel into port upon mere possibility and surmise to the contrary, *he did it at the peril of indemnifying the neutral if his surmise should turn out to be groundless.*

In taking Anduze to Amsterdam, the neutral

master was doing a perfectly innocent act ; and it would be strange if the consequence of this innocent act should be to subject him to the heavy loss he has incurred, although he had taken every precaution to manifest the neutrality of ship and cargo which could be supposed to be necessary. If such doctrine be according to the law of nations, it will be impossible for a neutral to provide for his security. Let his vessel and goods be documented how they may, let his conduct be ever so unexceptionable, some solitary conjecture may always be conjured against him which shall be sufficient to ruin all his prospects, and compel him besides to sacrifice his time and money in an admiralty contest, by which every thing is to be lost and nothing to be gained. I, for one, think better of the law of nations—and I am, therefore, of opinion that when Sir James Marriott pronounced for restitution, he should have granted to the claimants costs, damages and demurrage, unless he was restrained by the orders of 6th November, 1793, which, however they might have bound him, are no rule for us. And, further, that as the claimants were obviously aggrieved by his refusal to grant these costs, &c., and were compelled to carry their case before the Lords for redress, the expenses attending, or consequent upon the appeal, are due to them from the British government.

WM. PINKNEY.

Gray's Inn Square, July 13th, 1797.

THE DIANA—*Gardner.*

MR. PINKNEY.—I am of opinion that the vessel and cargo were seized and carried into port without probable ground of suspicion, that either vessel or cargo were lawful prize ; and that the facts afterwards disclosed in regard to throwing papers overboard, which were, at the time of such disclosure, proved to be wholly immaterial, and to have been destroyed under apparently well founded impressions that the privateer in chase was French, did not furnish any such ground. I think of course that the claimants are entitled to full and complete compensation for the loss and damage occasioned by this capture, including expenses and demurrage.

WILLIAM PINKNEY.

February 23d, 1797.

 THE SALLY—*Hayes.*

MR. PINKNEY.—The question proposed in this case, and the decision it has received, have drawn from the British commissioners a declaration “ that “ they do not think themselves competent, *under “ the words of the treaty, or the commission by “ which they act, to take any share without the “ special instructions of the king’s ministers, in “ the decision of any cases in which the judicial*

“proceedings are still depending in the ordinary course of justice.”

This declaration, which at their instance has been recorded, assumes for its basis that our powers, as they are to be found in the treaty, do not embrace complaints in which the judicial remedy is yet depending ; and further that a contrary opinion pronounced by a majority of the Board, consisting of the two American commissioners and the fifth commissioner, is so far from being obligatory on the minority, consisting of the two British commissioners, that they (the British commissioners) are bound, *without special instructions from one only of the contracting parties*, so to oppose themselves to that opinion, as, by retiring from the Board, or otherwise impeding its progress or suspending its functions to prevent the effect to which the decision of the majority may, on such a subject, be entitled.

Upon the points thus involved in this declaration, I have already given my opinion ; but the course which this transaction has taken makes it proper that I should file the reasons upon which that opinion has been formed.

Stated in as few words as possible, they are as follows :

1st. The principle that *in the interpretation of our powers*, the majority of the Board cannot conclude the minority, (upon which I shall first remark,) is not a new one.

It occurred, though perhaps in a different form, was much canvassed, and finally abandoned in the

case of the *Betsey*, *Furlong*. I had supposed that the inadmissible nature of this principle had, on that occasion, been fully understood, and that the principle itself would never be revived. This supposition was evidently authorized by the issue of that claim, as well as by the circumstances that marked its progress, and has since been repeatedly confirmed in practice by both of the British commissioners. I allude particularly to their conduct on that class of complaints called provision cases.

When those cases were preferred to us, the most prominent question, to which they gave occasion, was whether the judicial remedy had been sufficiently prosecuted according to the intent of the treaty. It was obviously impracticable to determine that question without looking to the extent and quality of our powers, and interpreting the instrument creating them. The British commissioners were of opinion, that those complaints were not within our cognizance, because, as they contended, the judicial experiment reaching no farther than the Court of Admiralty, had not been completely made. Yet they acquiesced in the opinion of the majority, and did not scruple to take all the *share* that was required of them in the several subsequent steps, by which that opinion was made to result in various awards to the perfection and authentication of which they lent their names. We have not been told, nor can it be pretended, that the revival of this discarded principle can be referred to any reasons bearing

peculiarly on the cases which are now to be affected by it, so as to account for that revival at this period more than at another appearing equally to demand it.

2. It can hardly be denied, or if denied, it is manifestly true, that the Board has the power to ascertain, *for the regulation of its own conduct*, whether a claim preferred to it falls within the description of the complaints committed to it for examination and decision.

Without such a power, the authority expressly communicated by the treaty to *decide the merits of the claim, and the amount of compensation to be awarded*, would be merely nominal and illusory.

We are directed by the 7th article to proceed *with diligence* to a certain specified end, viz., to determine claims presented to us under that article, according to their merits, and to equity, justice, and the laws of nations. We cannot proceed to that end, without considering and determining whether the claims so presented to us are within the article or not: of course, it is not possible to doubt our competency to this incidental inquiry and determination.

It is not, however, to be admitted, that the treaty does not *in terminis* empower us to interpret for ourselves the submission it contains; although it would be of no real importance, if it were otherwise. In stating the manner in which this Board is to proceed, the 7th article refers to the 6th. The 6th article says, that "the said commissioners, in examining complaints and applications, are

empowered and required, *in pursuance of the true intent and meaning of this article*, to take into consideration all claims," &c.

If the words "in pursuance," &c., mean any thing, they mean that the commissioners are to consider the nature and scope of the submission, the quality and size of their powers, and are to act accordingly in the execution of their trust.

In a word, the Board has authority to determine its own jurisdiction.

3d. If the Board possesses this authority, it will follow, inevitably, that it may be exercised by a majority of its members present, when the Board is duly formed. For the treaty, after declaring that three of the commissioners shall constitute a Board, and shall have power to do any act appertaining to the said commission, provided that one of the commissioners named on each side, and the fifth commissioner shall be present, proceeds thus :—"And *all* decisions shall be made *by the majority of the voices of the commissioners then present.*"

I have, indeed, heard it suggested, that a distinction is to be taken here between decisions upon the scope of our powers, and decisions upon the merits of complaints.

I cannot conjecture upon what grounds such a distinction can be rested ; but I believe it to be plain, that there is no warrant for it in the *treaty*, where only I think it material to search for it.

4th. If the Board has this power, and if it is proper to be exercised by the majority, then will

it also follow, that the minority must submit to such exercise, and cannot rightfully control or prevent its effect by seceding from the Board or otherwise.

To say that the majority have the power to decide, and yet *that* this power may be resisted or evaded by the minority, so as that it shall wholly depend upon their will, is an incomprehensible solecism. It would be a waste of words to argue against so flagrant an absurdity.

But if the British commissioners can on this occasion rightfully retire from the Board, to defeat the will of the other commissioners composing the majority, who does not see that they can do so on every other question of jurisdiction, or, to be more explicit, in every case that can occur; and thus, although but a minor portion of a Board directed in the instrument of its constitution to act in *all* instances by a majority of voices, render the whole authority and activity of that Board dependent upon their individual judgment, not only suspend at their pleasure, but annihilate its functions, not only retard its advances to a result which each member of it has sworn to endeavour with diligence to reach, but raise an insurmountable barrier to the possible attainment of that result?

Nor is it certain that the evil and the absurdity, if pushed to their utmost extent, would stop here. It is not clear that it would be open to the United States to complain of such a nullification of the seventh article of the treaty by the two British

commissioners, as a breach of that article by the British government. Let it be supposed, for the sake of illustrating this idea, that we are right, and the British commissioners are wrong in the construction of our powers, but that the British government does not choose to direct its commissioners to accede to our construction, or to take a share in giving efficacy to it, by attending to form a Board, could the United States, upon the ground of the treaty, remonstrate against this to the government of Great Britain as any violation of its plighted faith? The British government might reply to such a remonstrance, that it lost no time in appointing its commissioners, in compliance with its undertaking; that those commissioners have the treaty for their guide, and are left to decide as that and their consciences shall dictate; that it is not bound to control them in favour of any class of claimants, or to point out to them what is or is not their duty; that it has done all to which its stipulation engages it, and that it is for the commissioners themselves, under the sanction of their official oath, to look to and ascertain the scope and complexion of the trust committed to them by the two countries, and the manner in which that trust is to be discharged.

I do not at present perceive that to such a vindication any satisfactory answer could be given, provided the British government did not by its own interference produce the secession of its commissioners.

And here it is proper to remark that the declaration of these commissioners is so far from ascribing its imagined incompetency in this and similar cases to any interference on the part of their government, or to any superinduced obstacle whatsoever, that it rests it exclusively on the words of the treaty and the commission by which they act.*

I do not doubt the *power*, whatever may be my opinion of the *right* of the British government, to restrain its commissioners from attending the Board, or from performing any other act of duty. But it will not admit of a question that such a restraint, if injurious to the other party to the treaty, or to its citizens, would be a clear and unequivocal breach of it, and might be so considered and proceeded upon by the government of the United States.

We are not, however, arrived (and I devoutly hope we never may) at a state of things so much to be deprecated. The threatened secession is announced as the intended act of *the commissioners themselves*, the propriety of which they profess to have deduced from the *terms of the treaty and their commission*.

In what parts of both or either of these documents they have been able to find the justification of a step so extraordinary in itself, and so important as to its possible effects, they have not thought

* There is nothing restrictive in the commission, it is co-extensive with the treaty. Vide. Journals.

it necessary in any sort to explain; but in declaring that they infer their supposed incompetency to take *any share* in our decision, and of course the necessity of their secession, from these sources only, they have sufficiently explained that no share in producing it is to be attributed to their government.

There cannot in fact exist, on the part of their government, any inducement to such an interposition. For even if our decision in this case on the import of the treaty should ultimately prove to be erroneous, no wrong would be done to the British government, since an award in pursuance of such a decision would be merely void.

Our determination on the extent of our powers, cannot take away or lessen the indefeasible right of the high contracting parties to interpret their own act, when the occasion shall be such as to incline them, and make it proper for them to exert that right.

But, on the other hand, a forbearance on our part to determine on our powers, so as to place ourselves in a situation to decide the merits of claims, and to fix the amount of compensation, if we shall believe any to be due, (according to the commands of the treaty and the tenor of our oath,) would reduce the article from which we derive our appointment to a dead letter; leave it without any inherent capacity to operate or become effectual, and make the Board rely in every stage of its progress (if, indeed, it could make any progress at all) upon the occasional instruc-

tions of the contracting parties, which neither is obliged to give, or the uncertain event of supplementary negotiations, over which we can have no control, and for which the article contains no provision.

In short, I believe it to be clear that it is the duty of this Board to proceed by a majority of voices, in the execution of the seventh article of the treaty, according to the estimate which the majority shall make of the true intent and meaning of the article, leaving the validity and effect of their proceedings to the judgment of those by whom they were appointed : and I believe it to be peculiarly evident, that no minority of this Board can of right control or prevent decisions appertaining to the commission by the majority upon any idea of their own incompetency, or the collective incompetency of the Board : and further, that any actual want of power in the Board, or any of its members, cannot be supplied by the special instructions of *one only of the contracting parties*.

I come now to the other question involved in the declaration, viz.—Whether the Board is now authorized by the seventh article of the treaty to examine and decide cases in which proceedings are still depending in the ordinary course of justice ?

On this question, the argument lies within a very narrow compass.

. The article stipulates, "that in all the cases of irregular or illegal capture or condemnation complained of in its recital, where, for whatever reason, adequate compensation could not at the time of making and concluding the treaty be actually obtained, had and received in the ordinary course of justice, full and complete compensation for the same will be made by the British government to the complainants."

For the purpose of rendering this stipulation effectual, the same article provides for the appointment of a Board of Reference. (consisting of five commissioners,) to whom the complaints in question are to be preferred and submitted for examination and decision according to certain rules; and it declares that the award of this Board shall be final and conclusive, both as to the justice of the claim and the amount of the sum to be paid to the claimant.

The article further provides, "that eighteen months from the day on which the said commissioners shall form a Board, and be ready to proceed to business, are assigned for receiving complaints and applications;" but that, nevertheless, the said commissioners shall be authorized, *in any particular cases in which it shall appear to them to be reasonable and just*, to extend the said term of eighteen months for any term *not exceeding six months after the expiration thereof*.

The article further provides, that each of the said commissioners shall take an oath or affirmation "honestly, *diligently*, impartially, and care-

fully to examine, and to the best of his judgment, according to the merits of the several cases, and to justice, equity, and the laws of nations, to *decide all such complaints as under the article shall be preferred to the said commissioners.*"

On the 10th of April last, the term of eighteen months, limited by the article for the exhibition of claims, expired; but previous to its expiration (on the last day of the term) the present complaint, with a variety of others in which the judicial remedy was not exhausted, was preferred to us.

As it is my intention to meet the general question arising out of the declaration of the British commissioners, I shall not here state or advert to the particular circumstances by which the present complaint, in relation to the point before us, might possibly claim to be distinguished.

My opinion is,—that in all the cases of irregular or illegal capture or condemnation recited in the preamble of the seventh article, in which, without the manifest delay, or negligence, or wilful omission of the claimants, adequate compensation has not been obtained in the ordinary course of justice, within the term assigned by the article for the reception of claims, we are authorized to proceed to an examination and decision of their merits, and to award compensation, if we shall believe it to be due.

The following are in substance my reasons for that opinion:

1st. It is obvious that complaints thus circumstanced are properly before us, or to speak more

correctly, have been duly *preferred under the article*. If they *have not* been duly preferred, *they never* can be, and of course can never in any event become the subject of our consideration, which none of us maintain.

The article assigns eighteen months for the reception of claims, and regularly every claim, to be entitled to the benefit of the article, must be presented to us within that term.

We have authority, it is true, in *particular cases*, for the advantage of claimants, and upon special grounds of reason and justice, to extend the terms six months longer, but a claimant is not, therefore, under any obligation to pass by the general limitation for the purpose of throwing himself upon our discretion, and hazarding the total exclusion of his application.

If he slips his time in the first instance, the treaty still allows him to ask to have his complaint received, upon showing sufficient cause to justify the indulgence; but it cannot be imagined that he is bound to pretermitt the exercise of his right of coming within the eighteen months, in order to put himself in a capacity to ask a favour in relation to the extension of that term, which he does not know that we shall grant.

Every claimant then, whose case is or can become proper for our cognizance, (and we all appear to agree that every case may sooner or later become so,) *may* file his application within the eighteen months, and if it be manifestly in his power to do so, *must* file it within that period.

The complaints in question, therefore, have been duly preferred under the article.

2d. If they have been *duly preferred under the article*, it will not be difficult to prove by the express letter of it, that it is *now* our duty to proceed to the examination and decision of them, according to their merits, and to justice, equity, and the laws of nations.

It is not, I think, to be doubted that the framers of the treaty, in adjusting the terms of our official oath, have taken care that they should be suitable to their own views, and to our powers; nor can it be too much to assume that whatsoever we find in that oath may be safely relied upon, so far as it reaches, as indisputable evidence of our duty.

The oath commands us *diligently to examine and decide* according to their merits, and to justice, equity, and the laws of nations, all such complaints as under the seventh article shall be preferred to us.

Thus, then, *a diligent examination and decision of complaints* is required to follow their due exhibition, a command which assuredly cannot be fulfilled, in regard to the class of cases in question, by delaying all examination and decision until the Lords of Appeal (and in some instances Sir James Marriott, and after him the Lords) shall have determined upon them, and until the tardy and circuitous process of that tribunal shall have been successively spent against captors, owners, and bail, to enforce their determination.

Nothing can be more conclusive than the language of this oath to show that the makers of the treaty did not mean to authorize, far less enjoin, the indefinite procrastination now contended for; but on the contrary that they designed to secure to the article that prompt and ready execution which alone could render it either just or satisfactory.

3d. But, independent of the explicit language of the oath, the whole scheme of the provision itself points to a certain epoch, beyond which there shall not, of necessity, be any delay.

The fixing of a period within which claims were to be preferred, and the precise and very narrow limits imposed upon the power to extend it in particular cases, is unequivocal proof that the complete fulfilment of our functions was not to depend upon events which might not happen for years, and might never happen at all.

It is not practicable to conceive any valuable object that could be expected to be answered by compelling claimants to make their applications within a certain time, or to be barred for ever from redress, if these applications were afterwards to be dormant, not only until the determination of Admiralty suits, but until the execution of Admiralty decrees.

In thus requiring the presentation of complaints within a defined limit, the framers of the treaty clearly suppose that all complaints, capable of being perfected at all, would be perfected

by the lapse of it; that they would in its course obtain the ingredients indispensable to their validity, and that they would then *or never* be true in all those material allegations essential to their title to consideration and redress.

In any other view they call upon parties to complain before the injury is consummate, and when it is uncertain that it ever will be so, and command them to allege that which is false, and may never be otherwise, for no conceivable purpose.

It is not to be believed that claims would be thus forced before us with such anxious haste, and at the risk of so serious a penalty as future exclusion, if the negociators had not meant that they might be acted upon as perfect.

They would at least have guarded against the consequences to which this premature exhibition of them (if such they intended it to be) was plainly calculated to lead.

They would have protected those uninformed and defective applications from dismissal during their progress to completion, if they had conceived that they were to rely for their perfection on a train of circumstances to occur long after they should be preferred. But they have not done this: so that if these applications do in fact want the characteristic feature of a complaint under the article, there is nothing to hinder us from rejecting them at once as irrelevant and groundless, and thus shutting them out from all possibility of relief.

4th. The article provides that his Britannic Majesty will cause the compensations adjudged by us to be paid at such places and times as we shall award, "and on condition of such releases "or *assignments* as by the said commissioners "may be directed."

If it was in the contemplation of the contracting parties that the judicial remedy should in all its stages be exhausted by every claimant before he should be authorized to demand our aid, it is not easy to ascribe to this provision for *assignments* any motive worthy of entering into a national stipulation.

But if it be supposed, that all cases in which the judicial remedy could not be exhausted within the time limited for preferring complaints, were, at the expiration of that time, to be subject to our cognizance, an adequate view is immediately found for this provision.

5th. If the British commissioners are right in their construction of the article, there never was a stipulation formed upon more inadmissible or more discordant principles.

According to that construction, the article refers the claimant in the first instance to the Courts of Admiralty of this country in a way so absolute, as only to allow him to come to us for an award when they shall have finally refused him redress, or, having decreed him redress, when it shall have been found impracticable, after a thorough trial, to enforce that decree.

But although every thing is thus made to depend on the Courts of Admiralty, and although we are to have no jurisdiction until they shall have thought proper to determine, there is no part of the article which gives to the claimant any assurance that these courts shall perform with reasonable diligence, or even at all, what is thus made to depend on them.

The case of the *Betsey*, Furlong, gives me authority now to say that this implicit confidence in the maritime tribunals of Great Britain, (whatever titles they may have to the respect of neutral nations,) is so far from distinguishing the seventh article of the treaty, that even after a decision by the highest Prize Court in the country *against the claimant*, we are authorized to entertain his claim, inquire into the merits of it, and grant compensation against the British government, if by the laws of nations, as applied to the case, we shall think it right to do so.

But if the *time of decision* is thus to be left to these Courts of Prize, without any limitation whatsoever, why is it that the confidence which this implies is not extended to the *decision itself*?

If the time of redress is to be entirely with them, why is it that the redress itself is not exclusively submitted to the same discretion?

In fact, the most important point to be guarded against, and that which it was most natural to anticipate, was delay: for it was not probable that the decrees of so enlightened a tribunal as the Lords Commissioners of Appeal, could, in many

instances, be the subject of well-founded complaint; but it was not at all improbable, that such a tribunal should sometimes administer justice with more wisdom than despatch.

The preamble to the treaty declares the intention of the parties to it, to terminate their differences, (among which the captures and condemnations recited in the seventh article were far from being the least considerable,) in such manner as should be best calculated to produce mutual satisfaction and good understanding.

In the spirit of this preamble, and in the nature of the thing, it seems just to consider the seventh article as a self-efficient definite arrangement, intrinsically adequate to the accomplishment of the object it professes to aim at:

But the interpretation put upon it by the British commissioners wholly deprives it of this character, by denying to it all activity and effect until the Courts of Prize of one of the contracting parties shall have done what the article does not stipulate that they shall do, either within a specified period, or generally within a reasonable time.

Such an interpretation places the promise contained in the article in the power of the party making it, and thus leaves it a promise merely in name and form. I cannot form an idea of a scheme of redress more ridiculously feeble and inoperative.

On the other hand, if our construction be received, the article will be rendered, not only consistent in all its parts, and simple and uniform in

its principle, but capable of fulfilling its own destination.

Nor does this construction, as has been supposed, in any shape, violate the letter of this article.

The words of the agreement are, "that in all such cases where adequate compensation cannot, for whatever reason, be now actually obtained, had and received by the said merchants and others, in the ordinary course of justice, full and complete compensation will be made," &c.

That the impracticability of obtaining judicial redress, as mentioned in this agreement, could only be established by subsequent events—by the result of actual experiments then making, or to be made, by the claimants—is admitted by us all.

The judicial remedy was to be tried; and, doubtless, it was meant that it should be fairly tried. Thus far it is clear; but it does not follow that the duration of the prescribed experiment was intended to be indefinite.

The negotiators might suppose, and evidently *did* suppose, that a term might be fixed, at the close of which that experiment should be said to be complete, and the inadequacy of the judicial remedy sufficiently manifested.

The efficacy of the arrangement they were forming demanded that such a term should be agreed on. It could not have the stamp and quality of a conclusive stipulation without it. It could not, as a contract, be said to have done any thing

secure or obligatory; until such a limitation was inserted in it.

That limitation is accordingly its prominent feature. It is to be seen in its *letter*, and to be inferred from every portion of the article, as I have already shown.

Nor is the limitation such a one, as it was improper for the United States to ask, or Great Britain to grant.

The treaty was framed in November, 1794, when the great mass of the cases were sub judice. Our Board was organized in 1796, and, consequently, the eighteen months assigned for the receipt of claims did not expire till April last: so that the limitation was not, could not, be much short of three years and a half.

It ought to be remembered, too, that the cases were not, in general, those of ordinary capture, but seizures under the immediate instructions of the British government; instructions of which it is moderate to say, that some were of highly questionable legality, while others were plainly unlawful.

It was not to be required (especially in a plan whose object was conciliatory and accommodating) that the neutral claimant should, under these, and perhaps other circumstances of aggravation, be compelled, for an indefinite length of time, to follow the captors for retribution through all the dilatory forms of admiralty proceedings, before the responsibility of the British government should become an available means of compensation.

That government, being originally a party to the wrong, could ask only a qualified resort to the ordinary remedy in its courts of judicature.

The foregoing sketch, which has reached a size, I did not wish or intend; contains the outline of my reasons on the subjects herein proposed.

It is not such as I could desire it to be, for it has been hastily made; but I put it upon our files in the confidence that it will be received with candour.

WILLIAM PINKNEY.

LONDON, *June 26th*, 1798:

EXTRACTED FROM THE MINUTES.

16th of April, 1803.

MR. PINKNEY observed that the nature of the motion,* and the circumstances connected with it, made it proper that he should explain at some length the view he had taken of the questions involved in it. These questions are;

1st. Whether the Board is competent under the treaty and convention, to include in the amount of compensation to be awarded to claimants, if it shall appear to be just and equitable to do so, interest during the late suspension?

* A motion made by Mr. Gore, that the Commissioners should proceed to subscribe the awards ready for their signature.

2d. Whether it would be just and equitable to do so ?

On the first question,

It is understood that no doubt is entertained as to our power on the subject of interest generally. The actual doubt is confined to interest from July, 1799, when our proceedings were interrupted by the interference of the British government until the resumption of our duties in January or February 1802, after the making of the convention. It is not easy to ascertain the exact foundation of this extraordinary doubt ; but so far as I am able to collect it from the entry on the Journals of the 17th of last month, made at the instance of Dr. Swabey, I understand it to be, that the treaty did not contemplate such an incident as this interruption of our proceedings, and therefore could not intend to authorize the allowance of interest during that interruption, and moreover that such interest is not the subject of any provision in the convention subsequently concluded : It is of course supposed to be *casus omissus*.

In the examination of this ground, (which Dr. Swabey now admits to be correctly stated,) I might certainly decline to perplex myself with an inquiry whether the framers of the treaty did, or did not foresee that our progress might be occasionally suspended by the occurrence of difficulties growing out of the novel and complicated arrangements contained in the sixth and seventh articles. It would be sufficient to say, that the assumption of the fact, that such a suspension

could not be, or was not contemplated at the making of the treaty, is purely gratuitous: but I cannot forbear to add, that, of all gratuitous assumptions, it is the least suited to the use that has been made of it, as it is not only highly improbable in itself, but would be of no importance in the argument, if it were true. It is, undoubtedly, to ascribe to the makers of the treaty a singular and most discreditable want of foresight to suppose that it never occurred to them, that obstacles against which no human wisdom could guard, might in the course of this before untried experiment, *temporarily arrest our proceedings without destroying our functions*; and this supposition will appear to be more peculiarly inadmissible when it is considered that independent of the difficulties in America, by which the commission under the sixth article was constantly embarrassed so as that it might almost be said to be in a perpetual state of suspension, we ourselves had scarcely assembled in 1796, before our proceedings in a whole class of cases of the greatest value and extent were entirely suspended; nor did the interruption cease until the British government, in a way which it ought to be confessed was highly honourable to it, thought proper to direct its commissioners to go on. Soon afterwards (early in 1798) we were reduced to a similar predicament in another class of cases, then comprehending the whole, or nearly the whole of the complaints before us. So that, in truth, the suspension now in question was the *third* by which the com-

mission has been retarded since its first organization. Of such an event, therefore, which this new and delicate scheme of adjustment was naturally to be expected to produce not once only, but frequently, and which accordingly it did produce, from time to time, as difficult topics presented themselves for discussion, it cannot be allowable to say, that it was *an incident not in the contemplation of the treaty, or of those by whom it was framed.*

But admitting it to be true that the exact case of a suspension was not, at the making of the treaty, contemplated as a possible incident, does it therefore follow, that if a suspension should nevertheless occur, every thing connected with it, or arising out of it should, upon our resuming our proceedings, be considered as *casus omnisus*? One should rather be disposed to think that, before we could venture upon such a conclusion, it would be our indispensable duty to go a little further and examine, whether the actual provisions of the treaty, reasonably interpreted with a proper view to their spirit and object, were sufficiently ample to reach and embrace the subject so connected with, or arising out of, the suspension?

The 7th article of the treaty is not an arrangement of detail. It would not have been made, if detail had been practicable. Accordingly, after reciting complaints of loss and damage sustained by the citizens or subjects of the contracting parties, it submits these complaints without limit or exception to us. It makes us the exclusive arbiters, not only of the *justice of the com-*

plaints, but also of *the amount of compensation* to be paid in each.

Of what the items of compensation shall consist, or by what process it shall be ascertained, it does not profess to state. It declares only that the compensation shall be *full and complete*, and leaves the rest to this Board, in confidence that it will do justice ; and so far is that confidence carried that, in the cases submitted to us, our award is declared to be *final and conclusive*.

In such a provision it would be vain to search for the traces of any anticipation of the incidents, to which its execution might give birth, with any view to the modification of the powers communicated by it. Such modification was incompatible with its genius and character. Its prominent feature, which it would seem to be impossible to mistake, is a clear intention to authorize the tribunal erected by it, *whenever and under whatever circumstances* it should be occupied with the claims committed to it, to deal with those claims according to its own opinion honestly formed of their title to redress, and the proper measure of that redress. Whether this commission should endure three years or eight—whether it should proceed without impediment, or at times be prevented from proceeding at all, were points which the treaty could not settle ; but it could determine, and it *has* determined, in the most explicit manner, that, when allowed to exert our powers, we should find in them no deficiency in regard to the justice of any claim regu-

larly before us, or the amount of the sum to be awarded. On these two points, therefore, viz. *the justice of a claim*, within our cognizance, and the *amount of the compensation*, so emphatically and completely referred to us by words of the widest extent and most comprehensive import, evidently in unison with the whole plan of the provision itself, there can be no *casus omissus* in the treaty.

Indeed the correctness of this conclusion is in effect admitted by those who deny it. They admit that we are empowered to grant interest both before the interval of the suspension and since. Whence do we derive that power? Certainly not from any words in the treaty, taking notice of interest *eo nomine*, or giving a defined or modified authority on the subject of it. We derive it simply from those words in the treaty, which submit the *amount of the compensation to our decision*.

The conceded power, therefore, to give interest on either side of the suspension, rests upon this, that such a power is necessary to enable us to settle the *amount of compensation* according to our notions of justice and equity. But is not this reason, undoubtedly the only one that can be assigned in favour of the power to grant interest *before and since the suspension*; broader than the power itself; and does it not discredit and falsify the pretended exception? In other words, does it not, in all fair reasoning incontrovertibly prove that we have the power to grant interest *during the suspension as well as before and after*.

Such a power being just as necessary, in the one case as in the other, "to enable us to settle the amount of compensation according to our notions of justice and equity?" It is quite impossible to avoid the force of this argument otherwise than by showing that there is an exception of some sort, either in the treaty or the convention, in regard to this obnoxious interest, an attempt which would presuppose an abandonment of the ground of *casus omissus* in favour of another, still less capable, if that were possible, of being defended. In the *treaty*, I think I have already shown that no such exception exists; and we shall soon see that it is not to be found in the *convention*, whose *provisions* it is now time to examine.

The convention directs us to proceed in the execution of our duties, *according to the provisions of the seventh article of the treaty*; except only that we are to make our awards payable in three equal annual instalments. Subject to this exception, therefore, our powers continue to be at least as ample as under the treaty.

The convention may be considered as *recommunicating* in 1802, by reference to the seventh article of the treaty, the powers originally communicated by that article in 1794, with the single modification above mentioned. We have, of course, the same power now, as formerly, conclusively to fix the amount of compensation in claims which we have decided to be just. But we not only have that power (in which it is admit-

ted that a power to give interest is included) unimpaired:—we have it freed by the convention from Dr. Swabey's objection, even if that objection was a sound one, as applied to the treaty only. The objection, as applied to the treaty, does not rely upon the inadequacy of the language of it to give the power in question, but from a loose inference drawn from a loose speculation, that such an incident as the suspension was not contemplated by it. Can *this* objection be transferred from the treaty to the convention? Manifestly not. The convention was *posterior* to the suspension, recites it, and removes it. The suspension was consequently in the contemplation of that instrument. To whatsoever objection, therefore, the original communication of the power in question may have been liable, on the mere supposition that such an event as the suspension was not then in view, the *recommunication* of this power, *since* the suspension, and with particular reference to it, must be free from that objection. In a word, there is not in my judgment, even the appearance of a reason for questioning the *authority of the Board* on this occasion.

On the second question,

The power of the Board to grant the interest in question, being thus, as I think, obvious, I will now say a very few words on the matter of equity. I have not been able to discover upon what precise grounds it is supposed, that in this view, interest *during* the suspension is distinguishable from interest *before and since*. It cannot be upon

the naked foundation of a temporary want of capacity in this Board, from July 1799 until 1802, to relieve the claimants: for, independent of the gross absurdity of allowing to such a fact, singly taken, so important an influence on the measure of the relief, what shall we say of interest from 1793 to 1796, when this Board was not even in existence? If the mere cessation, for a season, of our capacity to act under the treaty renders it unjust to allow interest during the period of that cessation, surely the argument is infinitely stronger against the allowance of interest during a period when we had no official capacity whatever; and yet it never occurred to any of us, or to either of the high contracting parties, that the interest before 1796 was inequitable. A notion must therefore be entertained that, in regard to this suspension, some *peculiar* considerations exist by which interest, during the interval occupied by it, ought to be held to be affected. What these considerations are, I am left to conjecture, since they have not been explained.

It is perhaps imagined that if a claimant should receive such interest from the British government, the former would be placed in a better situation, and the latter in a worse, than if the suspension had not happened. If this should appear to be true, I agree that it would be of great weight. It is, however, so totally erroneous as to be the exact reverse of the truth; the fact is, that the claimant will be a loser, and the British government a gainer, by the suspension, even after this

interest shall have been paid and received. A very short examination will make this apparent.

As to the *claimant*. If the suspension had not taken place, his complaint, supposing it to be ready for decision, would have been decided by the Board, so as that an award would have been made in his favour, payable in the spring of 1800, for principal and *interest then due*. He loses, of course, by the suspension, the use from the spring of 1800, not only of his principal, but of such interest upon that principal, as, but for the suspension, would at that time have come to his hands. To put him, therefore, in any thing like so good a situation as he would have been in if the suspension had not occurred, it would be necessary not only to give him interest upon his principal during and after the suspension, as we propose to do, but also to give him interest from the spring of 1800 upon the amount of such interest, as the suspension prevented him from then receiving. A claimant, whose case was ready for decision, will consequently be so far from being a gainer by the suspension, if the interest in question be allowed him, that even after the receipt of that interest, he will still have sustained a considerable loss, for which it is not intended by any member of this Board to give him any compensation at all. In addition to this, it is to be considered, that the claimants being merchants, are not adequately compensated for the privation of what ought to have formed a part of their capital, at a time when commercial capital was more than usually active, by a re-

tribution granted with a view to the mere rate of interest.

The foregoing observations, it is to be admitted, apply solely to claimants whose cases, in regard to the judicial remedy, were ready for our decision at the commencement of the suspension, or would have become so in the course of it; and they apply undoubtedly with less or greater force, according as the time when the case was, or would have been ready, shall be taken to have been late or early. As to the other claimants, (not many in number,) they were certainly not losers by the suspension; for it produced no effect at all upon their claims. But it must at the same time be seen that, for precisely the same reason, Great Britain could not be, as to such claims, in the *slightest degree injured* by the suspension: and indeed it is understood to be admitted that, on the footing of equity, the suspension does not affect these claims in the same manner as it is supposed to affect the others.

Let us now see how the account stands on the part of the British government.

The gain of the British government may safely be affirmed to be at least co-extensive with the claimants' loss. In cases ready for decision, or that would have become so during the suspension, it has already been shown that it has enjoyed the use of the claimants' principal *by reason of the suspension only*: and if this were the whole benefit, it would seem to be obvious that the suspension rather furnishes an argument in favour of the

payment of interest than the contrary. But the suspension has also given it the use of the claimants' *interest* due at the time of it, which interest must have been paid in or about the year 1800, and upon which, if it had been paid, the British government would now be paying, as well as upon the principal, an annuity to some public creditor. The whole foundation of the argument, then, against the equity of granting against the British government interest, during the suspension on the claimants' principal, is, properly understood, neither more nor less than this, that during that interval it has had the use of both *principal and interest*, so far as interest had then accrued. There cannot be a better foundation on which to *grant* this interest.

To what has been said it ought to be added that the British government has been benefited by the suspension to a considerable amount in another respect. Large sums have been recovered by the claimants from the captors during the suspension, which might otherwise have been wholly or in a great measure lost. The effect has been greatly to lessen the aggregate of the sums to be awarded. Upon the whole, the suspension is not an event by which the British government has suffered, or can suffer, so as to create an equity in its favour on this occasion. It has, on the contrary, been, and will continue to be, advantageous to it, and prejudicial to the claimants, let this question be disposed of as it may.

In what other view this subject can be considered, I am entirely at a loss to conjecture. We do not, I take it for granted, think ourselves at liberty to go into an endless and odious inquiry by whose fault, if by any fault, the suspension was produced. Nor do we, I also take for granted, imagine that, even if such an inquiry could now lead to any result, the utility of that result, as it might be made to bear upon the question before us, would make amends for the time and attention employed upon it. The convention is either a dead letter, or it has put such an offensive discussion for ever at rest both here and elsewhere : and, if it had not, where are our means of agitating it, with any hope of arriving at a correct conclusion ? To endeavour at this late hour to influence either the sense or the practical operation of the convention, by an arbitrary and invidious imputation of an antecedent blame avoided, and therefore rejected, by the convention itself, and which, if not so rejected, it would now be impossible to fix, would be so extraordinary and monstrous an irregularity, that I am entirely confident it has not been thought of. The convention has told us all that it was intended we should know on this subject, and all that either of the contracting parties can at this time be free to insist upon, viz. that the suspension was produced by the immediate act of the British government, in consequence of difficulties having arisen in America, under the sixth article of the treaty.

With this character conclusively given to that transaction by the convention, it would be worse than idle to attempt to give it another, in which the presumed misconduct of either of the two governments should be an ingredient. But give to it what character you will, and ascribe it to what fault you may, still, if the situation of the British government, in reference to the claims depending under the seventh article, is no worse than it would have been had not the suspension happened, it is inconceivable in what way, or upon what intelligible principles, it can give an equity against those to whom the suspension or its consequences cannot be attributed, to whom it has been so far from being advantageous, that the most liberal compensation which they are likely to procure will not repair the injury they have sustained by it.

I will make but one observation more on this subject. If we should enter into an inquiry whether either, and which of the two governments, was in fault as to the suspension; if we should even be disposed to think, as most certainly some of us would not, that the American government was so in fault; if we should go on to infer that *therefore* the *British* government was not to pay interest during the suspension to *American* claimants, there would still remain a most embarrassing question which we should find it difficult to settle, i. e. whether the *American* government should pay interest during the suspension to *British* claimants?

To give to British claimants a larger measure of redress in this respect than we give to American claimants, upon a vague charge of misconduct against one of the high contracting parties, for which no countenance is found in the contract itself, would be to set up a distinction which the convention does not acknowledge, but disclaims; which the contracting party, outraged by the accusation, would hold, and justly hold, to be indecent and arrogant; and which, as regards the innocent complainants, would be too iniquitous for any honest man to lend himself to.

On the other hand, if, withheld by these or other considerations, we should forbear to make the distinction, what will have become of our principle, or our title to consistency? This is a dilemma on which I will not enlarge, but on which it might be well to reflect. It shows the utter inadmissibility of the objection which, if listened to and acted upon, would produce it.

Mr. Pinkney concludes by seconding the motion; but at the request of Mr. Trumbull, it was postponed for a few days, and on the 30th of April, the Board proceeded to make awards on the principle contended for by Mr. Gore and Mr. Pinkney.

Nº. II.

MEMORIAL ON THE RULE OF THE WAR OF 1756.

To the President of the United States, and the Senate and House of Representatives of the United States of America, in Congress assembled :

THE MEMORIAL OF THE MERCHANTS AND TRADERS OF THE CITY OF BALTIMORE.

Your memorialists beg leave respectfully to submit to your consideration the following statement and reflections, produced by the situation of our public affairs, in a high degree critical and perilous, and peculiarly affecting the commerce of their country.

In the early part of the late war between Great Britain and France, the former undertook to prohibit neutral nations from all trade whatsoever with the colonies of the latter. This exorbitant pretension was not long persisted in. It was soon qualified in favour of a direct trade between the United and these colonies, and some years afterwards was further relaxed in favour of European neutrals. The United States being thus admitted, by the express acknowledgment of Great Britain, to a direct trade, without limit, between their own ports and the colonies of the opposite belligerents, another trade naturally and necessarily grew out of it, or rather formed one of its principal objects and inducements. The surplus colonial produce, beyond our own consumption, imported here, was to be carried elsewhere for a market ; and it was accordingly carried to Europe, sometimes by the original importer, sometimes by other American merchants, either in the vessels in which the importation was made, or in others. In the course of this traffic, it was understood to be the sense of Great Britain, and was explicitly declared by her courts of prize, that, although she had not expressly allowed to the merchants of the

United States, by the letter of her relaxations, and immediate trade between the colonies of her enemies and the markets of Europe, a circuitous trade to Europe, in the production of these colonies, was unexceptionable; and that nothing more was necessary to make it so, than that the continuity of the voyage should be broken by an entry, and payment of duties, and the landing of the colonial cargo in the United States. During the greater part of the late war, and the first years of the present, this trade was securely prosecuted by our merchants, in the form which Great Britain had thus thought fit to give to it.

The modification of a traffic, in itself entitled to be free, was submitted to, on our part, without repining, because it presented a clear and definite rule of conduct, which, although unauthorized in the light of a restriction, was not greatly inconvenient in its practical operation; and your memorialists entertained a confident hope, that, while on the one hand, they sought no change of system by which the assumption of Great Britain to impose terms, however mild in their character and effect, upon their lawful commerce, should be repelled; on the other hand, it would not be desired, that the state of things which Great Britain had herself prescribed, and which use and habit had rendered familiar, and intelligible to all, should be disturbed by oppressive innovations; far less that these innovations should, by a tyrannical retrospection, be made to justify the seizure and confiscation of their property, committed to the high seas, under the protection of the existing rule, and without warning of the intended change.

In this their just hope, your memorialists have been fatally disappointed. Their vessels and effects, to a large amount, have lately been captured by the commissioned cruizers of Great Britain, upon the foundation of new principles, suddenly invented, and applied to this habitual traffic, and suggested, and promulgated, for the first time, by sentences of condemnation; by which, unavoidable ignorance has been considered as criminal, and an honourable confidence in the justice of a friendly nation, pursued with penalty and forfeiture.

Your memorialists are in no situation to state the precise nature of the rules to which their most important interests have thus been sacrificed: and it is not the least of their complaints against

them, that they are undefined, and undefinable, equivocal in their form, and the fit instruments of oppression by reason of their ambiguity.

Your memorialists know that the circumstances which have heretofore been admitted to give legality to their trade, in colonial productions, with their European friends, protect it no longer. But they have not yet been told, and are not soon likely to learn, what other circumstances will be suffered to produce that consequence. It is supposed to have been judicially declared, in general, that a voyage undertaken for the purpose of bringing into the United States the produce of the belligerent colonies, purchased by American citizens, shall, if it appears to be intended that this produce shall ultimately go on to Europe, and an attempt is actually made to re-export and send it thither, be considered, on account of that intention, as a direct voyage to Europe, and therefore illegal, notwithstanding any temporary interruption or termination of it in the United States.

Your memorialists will not here stop to inquire upon what grounds of law or reason the same act is held to be legal when commenced with one intention, and illegal when undertaken with another. But they object, in the strongest terms, against this new criterion of legality, because of its inevitable tendency to injustice, because of its peculiar capacity to embarrass with seizure, and to ruin with confiscation, the whole of our trade with Europe in the surplus of our colonial importations.

The inquiry which the late system indicated was short and simple, and precluded error on all sides; but the new refinement substitutes in its place a vast field of speculation, overshadowed with doubt and uncertainty, and of which the faint and shifting boundaries can never be distinctly known.

Intention, as to the object of our colonial voyages, may be inferred from numerous circumstances, more or less conclusive. To anticipate them all is obviously impracticable; and of course to guard against the inference, in this respect, which British captains and British courts may be disposed to draw, will be impossible. Our property is therefore menaced by a great and formidable danger, which there are no means of eluding; for, even if it should chance to escape the condemnation which this pernicious

novelty prepares for it, the wound inflicted upon our commerce by arrestations on suspicion, and detentions for adjudication, will be deep and fatal. The efforts of our merchants will be checked and discouraged by more than ordinary inquisitions ; our best concerted enterprises broken up, without the hope of retribution, or even reimbursement for actual costs, upon the footing of an intention arbitrarily imputed ; and the only alternative which will be presented to our choice will be, either to refrain at once from a traffic which enriches our country while it benefits ourselves, or to see it wasted, and in the end destroyed, by a noxious system of maritime depredation.

Your memorialists are the more alarmed by this departure from a plain and settled rule, in favour of a pliant and mysterious doctrine, so eminently suited to the accomplishment of the worst purposes of commercial jealousy, because the injurious and vexatious qualities of the substituted rule must have been known to those who introduced it, and because, if these qualities did not recommend it to adoption, it is difficult to conceive why it was adopted at all. If it is meant that our trade to Europe shall, notwithstanding this rule, be allowed to continue without being subjected to extraordinary difficulties, operating as actual reductions and mischievous restraints ; if it is meant that a few facts, known and comprehended, shall, as heretofore, form a standard by which the lawfulness of our European voyages may be unequivocally ascertained ; if a wide range has not been designed for the inquiry after intention, and a real effect expected from that inquiry ; if, in a word, the late regulation has not been supposed to be capable of bearing on our trade in a manner new and important, we should hardly have now been called upon to remonstrate against a change. It is not pretended that the rule now enforced against us, is levelled against any practice to which we may be supposed to have lent ourselves, of disguising as our own the property of the enemies of Great Britain. That is not its object ; and if it were, we are enabled to assert, solemnly and confidently, that our conduct has afforded no ground for the injurious suspicion which such an object would imply. The view is professedly to regulate and effect our traffic in articles fairly purchased by us from others ; and if the consequences to that traffic

were not intended to be serious, and extensive, and permanent, your memorialists search in vain for the motive by which a state, in amity with our own, and moreover connected with it by the ties of common interest, to which many considerations seem to give peculiar strength, has been induced to indulge in a paroxysm of capricious aggression upon our rights, by which it dishonours itself without promoting any of those great interests for which an enlightened nation may fairly be solicitous, and which only a steady regard for justice can ultimately secure. When we see a powerful state, in possession of a commerce of which the world affords no examples, endeavouring to interpolate into the laws of nations casuistical niceties and wayward distinctions, which forbid a citizen of another independent commercial country, to export from that country what unquestionably belongs to him, only because he imported it himself, and yet allow him to sell a right of exporting it to another; which prohibit an end because it arises out of *one* intention, but permit it when it arises out of *two*; which, dividing an act into stages, search into the mind for a correspondent division of it in the contemplation of its author, and determine its innocence or criminality accordingly; which, not denying that the property acquired in an authorized traffic, by neutral nations from belligerents, may become incorporated into the national stock, and under the shelter of its neutral character, thus superinduced, and still preserved, be afterwards transported to every quarter of the globe, reject the only epoch which can distinctly mark that incorporation, and point out none other in its place; which, proposing to fix with accuracy and precision the line of demarcation, beyond which neutrals are trespassers upon the wide domain of belligerent rights, involves every thing in darkness and confusion: there can be but one opinion as to the purpose which all this is to accomplish.

Your memorialists have endeavoured, with all that attention which their natural anxiety was calculated to produce, to ascertain the various shapes which the doctrine in question is likely to assume in practice, but they have found it impossible to conjecture in what way, consistently with this doctrine, the excess of our imports from the belligerent colonies can find its way to foreign-markets. The landing of the cargo, and a compliance with all the

forms and sanctions, upon which our revenue depends; will not so terminate the voyage from the colonies, as that the articles may be *immediately* re-exported to Europe by the original importer. But if they cannot be exported immediately, what lapse of time will give them a title to be sent abroad, and if not by the original importer, how is he to devolve upon another a power which he has not himself? And if by a sale he can communicate the power, by what evidence is the transfer to be manifested, so as to furnish an answer to the ready accusation of fraud and evasion? In proportion as this doctrine has developed itself, it has been found necessary to invent plausible qualifications, tending to conceal its real character from observation. It has accordingly been surmised, that, notwithstanding the obstacles which it provides against the re-exportation of a colonial cargo by the importer, such a re-exportation may, perhaps, be lawful. Attempts on his part to sell in the United States, without effect, (which must often happen,) may, it is supposed, be sufficient to save him from the peril of the rule. But, admitting it to be certain, instead of being barely *possible*, that these attempts would form any thing like security against final condemnation, it is still most material to ask, how they are to afford protection against seizure? By what documents they can be proved to the satisfaction of those to whom interest suggests doubts, and whom impunity encourages to act upon them? The formal transactions of the custom-house once deserted as a criterion, the cargo must be followed, through private transfers, into the ware-houses of individual merchants; and when proofs have been prepared, with the utmost regularity, to establish these transfers, or the other facts which may be deemed to be equivalent, they are still liable to be suspected, and will be suspected, as fictitious and colourable, and capture will be the consequence. For the loss and damage which capture brings along with it, British courts of prize grant no adequate indemnity. Redress to *any* extent is difficult; to a *competent* extent, impossible. And even the costs which an iniquitous seizure compels a neutral merchant to incur, in the defence of his violated rights, before their own tribunals, are seldom decreed, and never paid.

Your memorialists have thus far complained only of the recent abandonment, by Great Britain, of a known rule, by which the

oppressive character of an important principle of her maritime code has heretofore been greatly mitigated. But they now beg leave to enter their solemn protest against the principle itself, as an arbitrary and unfounded pretension, by which the just liberty of neutral commerce is impaired and abridged, and may be wholly destroyed.

The reasons upon which Great Britain assumes to herself a right to interdict to the independent nations of the earth a commercial intercourse with the colonies of her enemies, (out of the relaxation of which pretended right has arisen the distinction in her courts between an American trade from the colonies to the United States, and from the same colonies to Europe) will, we are confidently persuaded, be repelled with firmness and effect by our government.

It is said by the advocates of this high belligerent claim, that neutral nations have no right to carry on with either of the parties at war any other trade than they have actually enjoyed in time of peace. This position forms the basis upon which Great Britain has, heretofore, rested her supposed title to prevent altogether, or to modify at her discretion, the interposition of neutrals in the colony trade of her adversaries.

But, if we are called upon to admit the truth of this position, it seems reasonable that the converse of it should also be admitted. That war should not be allowed to disturb the customary trade of neutrals in peace; that the peace-traffic should, in every view, be held to be the measure of the war-traffic; and that, as on the one hand there can be no enlargement, on the other there shall be no restriction. What, however, is the fact? The first moment of hostilities annihilates the commerce of the nations at peace, in articles deemed contraband of war; the property of the belligerents can no longer be carried in neutral ships; they are subject to visitation on the high seas; to harassing and vexatious search; to detention for judicial inquiry; and to the peril of unjust confiscation: they are shut out from their usual markets, not only by military enterprises against particular places, carried on with a view to their reduction, but by a vast system of blockade, affecting and closing up the entire ports of a whole nation: such have been the recent effects of an European war upon the trade of this neutral country; and the prospect of the

future affords no consolation for the past. The triumphant fleets of one of the contending powers cover the ocean; the navy of her enemies has fallen before her; the communication by sea with France, and Spain, and Holland, seems to depend upon her will, and she asserts a right to destroy it at her pleasure: she forbids us from transporting, in our vessels, as in peace we could, the property of her enemies; enforces against us a rigorous list of contraband; dams up the great channels of our ordinary trade; abridges, transmits, and obstructs what she permits us to prosecute, and then refers us to our *accustomed traffic in time of peace*, for the criterion of our commercial rights, in order to justify the consummation of that ruin with which our lawful commerce is menaced by her maxims and her conduct.

This principle, therefore, cannot be a sound one; it wants uniformity and consistency; is partial, unequal, and delusive: it makes every thing bend to the rights of war, while it affects to look back to, and to recognize, the state of things in peace, as the foundation and the measure of the rights of neutrals. Professing to respect the established and habitual trade of the nations at peace, it affords no shadow of security for any part of it: professing to be an equitable standard for the ascertainment of neutral rights, it deprives them of all body and substance; and leaves them only a plausible and unreal appearance of magnitude and importance: it delivers them over, in a word, to the mercy of the states at war, as objects of legitimate hostility; and while it seems to define, does, in fact, extinguish them. Such is the faithful picture of the theory, and practical operation of this doctrine.

But, independent of the considerations thus arising out of the immediate interference of belligerent rights and belligerent conduct with the freedom of neutral trade, by which the fallacy of the appeal to the precise state of our peace-trade, as limiting the nature and extent of our trade in war, is sufficiently manifested, there are other considerations which satisfactorily prove the inadmissibility of this principle.

It is impossible that war among the primary powers of Europe should not, in an endless variety of shapes, materially affect the whole civilized world. Its operation upon the prices of ta-

bour and commodities; upon the value of money; upon exchange; upon the rates of freight and insurance, is great and important. But it does much more than all this. It imposed upon commerce in the gross, and in its details, a new character; gives to it a new direction, and places it upon new foundations. It abolishes one class of demands; creates, or revives others; and diminishes, or augments the rest. And, while the wants of mankind are infinitely varied by its powerful agency, both in object and degree, the modes and sources of supply, and the means of payment are infinitely varied also.

To prescribe to neutral trade thus irresistibly influenced, and changed, and moulded by this imperious agent, a fixed and unalterable station, would be to say that it shall remain the same, when not to vary is impossible; and to require, since change is unavoidable, that it shall submit to the ruinous retrenchments and modifications which war produces, and yet refrain from indemnifying itself by the fair advantages which war offers to it as an equivalent, cannot be warranted by any rule of reason or equity, or by any law to which the great community of nations owes respect and obedience.

When we examine the conduct, of the maritime powers of Europe, in all the wars in which they have been engaged for upwards of a century, we find that each of them has, occasionally, departed from its scheme of colonial monopoly; relaxed its navigation laws, and otherwise admitted neutrals, for a longer or shorter space, as circumstances required, to modes of trade from which they were generally excluded.

This universal practice, this constant and invariable usage, for a long series of years, would seem to have established among the European states a sort of customary law upon the subject of it, from which no single power could be at liberty to depart, in search of a questionable theory at variance with it. Great Britain is known to suspend, in war and on account of war, her famous act of navigation, to which she is supposed to owe her maritime greatness, and which, as the palladium of her power, she holds inviolable in peace; and her colonies are frequently thrown open, and neutrals invited to supply them, when she cannot supply them herself. She makes treaties in the midst of

war, (she made such a treaty with us) by which neutrals are received into a participation of an extensive traffic, to which before they had no title. And can she be suffered to object, that the same, or analogous acts are unlawful in her enemies; or that, when neutrals avail themselves of similar concessions made by her opponents, they are liable to punishment, as for a criminal intrusion into an irregular and prohibited commerce?

The weight of this consideration has been felt by the advocates of this doctrine, and it has, accordingly, been attempted to evade it by a distinction, which admits the legality of all such relaxations in war, of the general, commercial or colonial systems of the belligerents, as do not arise out of the predominance of the enemy's force, or out of any necessity resulting from it.

It is apparent, however, that such relaxations, whether dictated by the actual ascertained predominance of the enemy's force, or not, do arise out of the state of war, and are almost universally compelled, and produced by it; that they are intended as reliefs against evils which war has brought along with it, and the opposite belligerent has just as much right to insist, that these evils shall not be removed by neutral aid, or interposition, as if they were produced by the general preponderance of her own power, upon the land or upon the sea, or by the general success of her arms. In the one case, as completely as in the other, the interference of the neutral lightens the pressure of war; increases the capacity to bear its calamities, or the power to inflict them; and supplies the means of comfort and of strength. In both cases, the practical effect is the same, and the legal consequences should be the same also.

But whence are we to derive the conclusion of the fact upon which this extraordinary distinction is made to turn? How are we to determine with precision and certainty, the exact cause which opens to us the ports of a nation at war—to analyze the various circumstances, of which, perhaps, the concession may be the combined effect; and to assign to each the just portion of influence to which it has a claim? How easy it is to deceive ourselves on a subject of this kind, Great Britain will herself instruct us, by a recent example. Her courts of prize have insisted that, during the war which ended in the peace of Amiens,

France was compelled to open the ports of her colonies, by a necessity created and imposed by the naval prowess of her enemies. And yet these ports were opened in February, 1793, when France and her maritime adversaries had not measured their strength in a single conflict; when no naval enterprize had been undertaken by the latter, far less crowned with success; when the lists were not even entered, and when the superiority afterwards acquired, by Great Britain in particular, was yet a problem; when the spirit of the French nation and government was lifted up to an unexampled height, by the enthusiasm of the day, and by the splendid achievements by which their armies had recently conquered Savoy, the county of Nice, Worms, and other places on the Rhine, the Austrian Low Countries, and Liege. It would seem to be next to impossible to contend that a concession made by France to neutrals, on the subject of her colony trade, at such a period of exultation and triumph, was "compelled by the prevalence of British arms," that it was "the fruit of British victories," or the result of "British conquest," that it arose out of the predominance of the enemy's force, that it was produced by "that sort of necessity which springs from the impossibility of otherwise providing against the urgency of distress inflicted by the hand of a superior enemy," and that "it was a signal of defeat and depression." It would seem to be impossible to say of a traffic so derived, "that it could obtain or did obtain, by no other title than the success of the one belligerent against the other, and at the expense of that very belligerent under whose success the neutral sets up his title." Yet all these things have been said, and solemnly maintained, and have even been made the foundation of acts, by which the property of our citizens has been wrested from their hands. It cannot be believed that the laws of nations have entrusted to a belligerent the power of harassing the trade, and confiscating the ships and merchandise of peaceable and friendly nations, upon grounds so vague, so indefinite, and equivocal. Of all law, *certainty* is the best feature; and no rule can be otherwise than unjust and despotic, of which the sense and the application are and must be ambiguous. A *siege* or *blockade* presents an intelligible standard, by which it may always be

known, that no lawful trade can be carried on with the places against which either has been instituted. But the suggestions upon which this new belligerent encroachment, having all the effect of a siege or blockade, is founded, are absolutely incapable of a distinct form, either for the purpose of warning to neutrals, or as the basis of a judicial sentence. The neutral merchant finds that, in fact, the colonial ports of the parties to the war are thrown open to him by the powers to which they belong; and he sees no hostile squadrons to shut them against him. Is he to pause, before he ventures to exercise his natural right to trade with those who are willing to trade with him, until he has inquired and determined *why* these ports have been thus made free to receive him? To such a complicated and delicate discussion, no nation has a right to call him. It is enough that an actual blockade can be set on foot to close these ports, and that they may be made the objects of direct efforts, for conquest or occlusion, if the enemy's force is, in truth, so decidedly predominant as it is pretended to be. And if it is not predominant to that point, and to that extent, there can be no cause for ascribing to it an effect to which it is physically incompetent, or for allowing it to do that constructively, which it cannot do, and has not done, actually. The pernicious qualities of this doctrine are enhanced and aggravated, as from its nature might be expected, by the fact, that Great Britain gives no notice of the time when, or the circumstances in which she means to apply and enforce it. Her orders of the 6th of November, 1793; by which the seas were swept of our vessels and effects, were; for the first time, announced by the ships of war and privateers by which they were carried into execution. The late decisions of her courts, which are in the true spirit of this doctrine, and are calculated to restore it, in practice, to that high tone of severity which milder decisions had almost concealed from the world, came upon us by surprise; and the captures of which the Dutch complained in the seven years' war, were preceded by no warning. Thus is this principle most rapacious and oppressive in all its bearings. Harsh and mysterious in itself, it has always been and ever must be used to betray neutral merchants into a trade supposed to be lawful, and then to give

them up to pillage and to ruin. Compared with this principle, which violence and artifice may equally claim for their own, the exploded doctrine of *constructive blockade*, by which belligerents for a time insulted and plundered the states at peace, is innocent and harmless. That doctrine had something of certainty belonging to it, and made safety at least *possible*. But there can be no security while a malignant and deceitful principle like this hangs over us. It is just what the belligerent chooses to make it—lurking, unseen, and unselt—or visible, active, and noxious. It may come abroad when least expected; and the moment of confidence may be the moment of destruction. It may sleep for a time, but no man knows when it is to awake, to shed its baleful influence upon the commerce of the world. It clothes itself from season to season, in what are called *relaxations*; but again, without any previous intimation to the deluded citizens of the neutral powers, these relaxations are suddenly laid aside, either in the whole or in part, and the work of confiscation commences. Nearly ten months of the late war had elapsed before it announced itself at all, and when it did so, it was in its most formidable shape, and in its fullest power and expansion. In a few weeks it was seen to lose more than half its substance and character, and before the conclusion of the war was scarcely perceptible. With the opening of the present war it re-appeared in its mildest form, which it is again abandoning for another, more consonant to its spirit. Such are its capricious fluctuations, that no commercial undertaking which it can in any way effect, can be considered as otherwise than precarious, whatever may be the avowed state of the principle at the time of its commencement.

It has been said that, by embarking in the colony trade of either of the belligerents, neutral nations in some sort interpose in the war, since they assist and serve the belligerent, in whose trade they so embark. It is a sufficient answer to this observation, that the same course of reasoning would prove that neutrals ought to discontinue all trade whatsoever with the parties at war. A continuance of their *accustomed peace trade* assists and serves the belligerent with whom it is continued; and if this effect were sufficient to make a trade unneutral and illegal, the best established and most usual traffic would of course become so. But

Great Britain supplies us with another answer to this notion, that our interference in the trade of the colonies of her enemies is unlawful, *because they are benefited by it*. It is known that the same trade is, and long has been, carried on by British subjects; and your memorialists feel themselves bound to state that, according to authentic information lately received, the government of Great Britain does at this moment grant licenses to neutral vessels, taking in a proportion of their cargoes there; to proceed on trading voyages to the colonies of Spain, from which she would exclude us, upon the condition that the return cargoes shall be carried to Great Britain, to swell the gains of her merchants, and to give her a monopoly of the commerce of the world. This great belligerent right then, upon which so much has been supposed to depend, sinks into an article of barter. It is used, not as a hostile instrument wielded by a warlike state, by which her enemies are to be wounded, or their colonies subdued; but as the selfish means of commercial aggrandizement, to the impoverishment and ruin of her friends; as an engine by which Great Britain is to be lifted up to a vast height of prosperity, and the trade of neutrals crippled, and crushed, and destroyed. Such acts are a most intelligible commentary upon the principle in question. They show that it is a hollow and fallacious principle, susceptible of the worst abuse, and incapable of a just and honourable application. They show that in the hands of a great maritime state, it is not in its ostensible character of a weapon of hostility that it is prized, but rather as one of the means of establishing an unbounded monopoly, by which every enterprise, calculated to promote national wealth and power, shall be made to begin and end in Great Britain alone. Such acts may well be considered as pronouncing the condemnation of the principle against which we contend, as withdrawing from it the only pretext upon which it is possible to rest it.

Great Britain does not pretend that this principle has any warrant in the opinions of writers on public law. She does not pretend, and cannot pretend, that it derives any countenance from the conduct of other nations. She is confessedly solitary in the use of this invention, by which rapacity is systematized; and a state of neutrality and war are made substantially the same. In

this absence of all other authority, her courts have made an appeal to her own early example, for the justification of her own recent practice. Your memorialists join in that appeal, as affording the most conclusive and authoritative reprobation of the practice which it is intended to support by it.

It would be easy to show, by an examination of the different treaties to which Great Britain has been a party from times long past, that this doctrine is a modern usurpation. It would be equally easy to show, that during the greater part of the last century, her statesmen and lawyers uniformly disavowed it, either expressly or tacitly. But it is to a review of *judicial* examples, of all others the most weighty and solemn, that your memorialists propose to confine themselves.

In the war of 1744, in which Great Britain had the power, if she had thought fit to exert it, to exclude the neutral states from the colony trade of France and Spain, her high court of appeals decided that the trade was lawful, and released such vessels as had been found engaged in it.

In the war which soon followed the peace of Aix la Chapelle, Great Britain is supposed to have first acted upon the pretension that such a trade was unlawful, as being shut against neutrals in peace. And it is certain that, during the whole of that war, her courts of prize did condemn all neutral vessels taken in the prosecution of that trade, together with their cargoes, whether French or neutral. These condemnations, however, proceeded upon peculiar grounds. In the seven years' war France did not throw open to neutrals the traffic of her colonies. She established no free ports in the east, or in the west, with which foreign vessels could be permitted to trade, either generally or occasionally *as such*. Her first practice was simply to grant *special licenses* to particular neutral vessels, principally Dutch, and commonly chartered by Frenchmen, to make, under the usual restrictions, particular trading voyages to the colonies. These licenses furnished the British courts with a peculiar reason for condemning vessels sailing under them, viz. "that they became in virtue of them the *adopted or naturalized vessels of France*."

As soon as it was known that this effect was imputed to these licenses they were discontinued, or pretended to be so; but the

discontinuance, whether real or supposed, produced no change in the conduct of Great Britain; for neutral vessels, employed in this trade, were captured and condemned as before. The grounds upon which they continued to be so captured and condemned, may best be collected from the reasons subjoined to the printed cases in the prize causes decided by the high court of admiralty, (in which Sir Thomas Salisbury at that time presided,) and by the lords commissioners of appeals, between 1757 and 1760.

.. In the case of the *America*, (which was a Dutch ship bound from St. Domingo to Holland with the produce of that island belonging to French subjects, by whom the vessel had been chartered,) the reason stated in the printed case is, "that the ship must be looked upon as a French ship, (coming from St. Domingo,) for by the laws of France no foreign ship *can* trade in the French West Indies."

In the case of the *Snip*, the reason (assigned by Sir George Hays and Mr. Pratt, afterwards Lord Camden) is, "for that the *Snip* (though once the property of Dutchmen) being employed in carrying provisions to, and goods from a French colony, *thereby became a French ship*, and as such was justly condemned."

It is obvious that the reason, in the case of the *America*, proceeds upon a presumption, that as the trade was, by the standing laws of France, even up to that moment, confined to *French ships*, any ship found employed in it must be a French ship. The reason in the other case does not rest upon this idle presumption, but takes another ground; for it states, that by the reason of the trade in which the vessel was employed, *she became a French vessel*.

It is manifest that this is no other than the first idea of adoption or naturalization, accommodated to the change attempted to be introduced into the state of things by the actual or pretended discontinuance of the special licenses. What then is the amount of the doctrine of the seven years' war, in the utmost extent which it is possible to ascribe to it? It is in substance no more than this, that as France did not, at any period of that war, abandon, or in any degree suspend, the principle of colonial monopoly, or the system arising out of it, a neutral vessel found in the prosecution of the trade, which, according to that principle and

that system still continuing in force, could only be a *French* trade and open to *French* vessels, either *became*, or was legally to be *presumed* to be a *French* vessel. It cannot be necessary to show that this doctrine differs essentially from the principle of the present day; but even if it were otherwise, the practice of that war, whatever it might be, was undoubtedly contrary to that of the war of 1744, and as contrasted with it will not be considered by those who have at all attended to the history of these two periods, as entitled to any peculiar veneration. The effects of that practice were almost wholly confined to the Dutch, who had rendered themselves extremely obnoxious to Great Britain, by the selfish and pusillanimous policy, as it was falsely called, which enabled them during the seven years' war to profit of the troubles of the rest of Europe.

In the war of 1744, the neutrality of the Dutch, while it continued, had in it nothing of complaisance to France; they furnished from the commencement of hostilities, on account of the pragmatic sanction, succours to the confederates; declared openly, after a time, in favour of the queen of Hungary; and finally determined upon and prepared for war, by sea and land. Great Britain, of course, had no inducement in that war to hunt after any hostile principle, by the operation of which the trade of the Dutch might be harassed, or the advantage of their neutral position, while it lasted, defeated. In the war of 1756 she had this inducement in its utmost strength. Independent of the commercial rivalry existing between the two nations, the Dutch had excited the undisguised resentment of Great Britain, by declining to furnish against France the succours stipulated by treaty; by constantly supplying France with naval and warlike stores, through the medium of a trade systematically pursued by the people, and countenanced by the government; by granting to France, early in 1757, a free passage through Namur and Maestricht, for the provisions, ammunition, and artillery, belonging to the army destined to act against the territories of Prussia, in the neighbourhood of the Low Countries; and by the indifference with which they saw Nieuport and Ostend surrendered into the hands of France, by the court of Vienna, which Great Britain represented to be contrary to the Barrier treaty and the treaty of

Utrecht. Without entering into the sufficiency of these grounds of dissatisfaction, which undoubtedly had a great influence on the conduct of Great Britain towards the Dutch, from 1757 until the peace of 1763, it is manifest that this very dissatisfaction, little short of a disposition to open war, and frequently on the eve of producing it, takes away, in a considerable degree from the authority of any practice to which it may be supposed to have led, as tending to establish a rule of the public law of Europe. It may not be improper to observe too, that the station occupied by Great Britain in the seven years' war, (as proud a one as any country ever did occupy,) compared with that of the other European powers, was not exactly calculated to make the measures which her resentments against Holland or her views against France might dictate, peculiarly respectful to the general rights of neutrals. In the north, Russia and Sweden were engaged in the confederacy against Prussia, and were, of course, entitled to no consideration in this respect. The government of Sweden was, besides, weak and impotent. Denmark, it is true, took no part in the war, but she did not suffer by the practice in question. Besides, all these powers combined would have been as nothing against the naval strength of Great Britain in 1758. As to Spain, she could have no concern in the question, and at length became involved in the war on the side of France. Upon the whole, in the war of 1756, Great Britain had the power to be unjust, and irresistible temptations to abuse it. In that of 1744, her power was, perhaps, equally great, but every thing was favourable to equity and moderation. The example afforded on this subject, therefore, by the first war, has far better titles to respect than that furnished by the last.

In the *American* war the practice and *decisions* on this point, followed those of the war of 1744.

The question first came before the lords of appeal in January, 1782, in the Danish cases of the *Tiger*, Copenhagen, and others, captured in October, 1780, and condemned at St. Kitts, in December following. The grounds on which the captors relied for condemnation, in the *Tiger*, as set forth at the end of the respondent's printed case, were, "for that the ship, having been trading to Cape Francois, where none but French ships are allowed

“to carry on any traffic, and having been laden at the time of the capture, with the produce of the French part of the island of St. Domingo, put on board at Cape Francois, and both ship and cargo taken confessedly coming from thence, must, (pursuant to precedents in the like cases in the last war,) to all intents and purposes, be deemed a ship and goods belonging to the French, or at least adopted, and naturalized as such.”

In the *Copenhagen*, the captor's reasons are thus given :

“1st. Because it is allowed that the ship was destined, with her cargo, to the island of *Guadaloupe*, and no other place.”

“2dly. Because it is *contrary to the established rule of general law, to admit any neutral ship to go to, and trade at, a port belonging to a colony of the enemy, to which such neutral ship could not have freely traded in time of peace.*”

On the 22d of January, 1782, these causes came on for hearing before the lords of appeal, who decreed *restitution* in all of them : thus in the most solemn and explicit manner disavowing and rejecting the pretended rules of the law of nations, upon which the captors relied ; the first of which was literally borrowed from the doctrine of the war of 1756, and the last of which is that very rule on which Great Britain now relies.

It is true, that in these cases the judgment of the lords was pronounced upon one shape only of the colony trade of France, as carried on by neutrals ; that is to say, a trade between the colony of France and that of the country of the neutral shipper. But, as no distinction was supposed to exist, in point of principle, between the different modifications of the trade, and as the judgment went upon general grounds applicable to the entire subject, we shall not be thought to overrate its effect and extent, when we represent it as a complete rejection both of the doctrine of the seven years' war, and of that modern principle by which it has been attempted to replace it. But at any rate, the subsequent decrees of the same high tribunal did go that length. Without enumerating the cases of various descriptions, involving the legality of the trade in all its modes, which were favourably adjudged by the lords of appeal after the American peace, it will be sufficient to mention the case of the *Vervagting*, decided by them in 1785 and 1786. This was the case of a Danish

ship laden with a cargo of dry goods and provisions, with which she was bound on a voyage from *Marseilles* to *Martinique* and *Cape Francois*, where she was to take in for Europe a return cargo of West India produce. The ship was not proceeded against, but the cargo, which was claimed for merchants of *Ostend*, was condemned as enemy's property (as in truth it was) by the vice admiralty of *Antigua*, subject to the payment of freight, *pro rata itineris*, or rather for the whole of the outward voyage. On appeal, as to the cargo, the lords of appeal, on the 8th of March, 1785, reversed the condemnation, and ordered further proof of the property to be produced within three months. On the 28th of March, 1786, no further proof having been exhibited, and the proctor for the claimants declaring that he should exhibit none, the lords condemned the cargo, and on the same day reversed the decree below, giving freight, *pro rata itineris*, (from which the neutral master had appealed,) and decreed freight generally, and the costs of the appeal.

It is impossible that a judicial opinion could go more conclusively to the whole question on the colony trade than this; for it not only disavows the pretended illegality of neutral interpositions in that trade, even directly between France and her colonies, (the most exceptionable form, it is said, in which that interposition could present itself,) it not only denies that property engaged in such a trade is, on that account, liable to confiscation, (inasmuch as, after having reversed the condemnation of the cargo, pronounced below, it proceeds afterwards to condemn it merely *for want of further proof as to the property*,) but it holds that the trade is so unquestionably lawful to neutrals, as not even to put in jeopardy the claim to freight for that part of the voyage which had not yet begun, and which the party had not yet put himself in a situation to begin. The force of this, and the other British decisions produced by the American war, will not be avoided, by suggesting that there was any thing peculiarly favourable in the time when, or the manner in which, France opened her colony trade to neutrals on that occasion. Something of that sort, however, has been said. We find the following language in a very learned opinion on this point: "It is certainly true, that in the last war, (the American war,) many de-

cisions took place which then pronounced, that such a trade between France and her colonies was not considered as an unneutral commerce; but under what circumstances? It was understood that France, in opening her colonies during the war, *declared*, that this was not done with a temporary view relative to the war, but on a general permanent purpose of altering her colonial system, and of admitting foreign vessels, universally, and at all times, to a participation of that commerce; taking that to be the fact (however suspicious its commencement might be, during the actual existence of a war) there was no ground to say, that neutrals were not carrying on a commerce as ordinary as any other in which they could be engaged; and therefore in the case of the *Vervagting*, and in many other succeeding cases, the lords decreed payment of freight to the neutral ship-owner. It is fit to be remembered on this occasion, that the conduct of France evinced how little dependence can be placed upon explanations of measures adopted during the pressure of war; for, hardly was the ratification of the peace signed, when she returned to her ancient system of colonial monopoly."

We answer to all this, that, to refer the decision of the lords, in the *Vervagting*, and other succeeding cases, to the reason here assigned, is to accuse that high tribunal of acting upon a confidence which has no example, in a singularly incredible declaration, (if, indeed, such a declaration was ever made,) after the utter falsehood of it had been, as this learned opinion does itself inform us, unequivocally and notoriously ascertained.

We have seen that the *Vervagting* was decided by the lords in 1785 and 1786, at least two years after France had, as we are told, "returned to her ancient system of colonial monopoly," and when of course the supposed assertion, of an intended permanent abandonment of that system could not be permitted to produce any legal consequence.

We answer further, that if this alleged declaration was in fact made, (and we must be allowed to say, that we have found no trace of it out of the opinion above recited,) it never was put into such a formal and authentic shape as to be the fair subject of judicial notice.

It is not contained in the French *arrêts* of that day, where only it would be proper to look for it, and we are not referred to any other document proceeding from the government of France, in which it is said to appear. There does not, in a word, seem to have been any thing which an enlightened tribunal could be supposed capable of considering as a pledge on the part of France, that she had resolved upon or even meditated the extravagant change in her colonial system which she is said, in this opinion, to have been understood to announce to the world. But even if the declaration in question was actually made, and that too with all possible solemnity, still it would be difficult to persuade any thinking man that the sincerity of such a declaration was in any degree confided in, or that any person in any country could regard it in any other light than as a mere artifice, that could give no right which would not equally well exist without it. Upon the whole, it is manifestly impracticable to rest the decisions of the lords of appeal, in and after the American war, upon any dependence placed on this declaration, of which there is no evidence that it ever was made, which it is certain was not authentically or formally made; which, however made, was not and could not be believed at *any* time, far less in 1785 and 1786, when its falsehood had been unquestionably proved by the public and undisguised conduct of its supposed authors, in direct opposition to it. That *Sir James Marriot*, who sat in the high court of admiralty of Great Britain during the greater part of the late war, did not consider these doctrines as standing upon this ground is evident; for, notwithstanding that in the year 1756 he was the most zealous and perhaps able advocate for the condemnation of the Dutch ships engaged in the colony trade of France, yet, upon the breaking out of the late war, he relied upon the decisions in the American war as authoritatively settling the legality of that trade, and decreed accordingly.

If, as a more plausible answer to these decisions, considered in the light of authorities, than that which we have just examined, it should be said that they ought rather to be viewed as reluctant sacrifices to policy, or even to necessity, under circumstances of particular difficulty and peril, than as an expression of the deliberate opinion of the lords of appeal, or of the

government of Great Britain ; on the matter of right, it might perhaps be sufficient to reply, that if the armed neutrality coupled with the situation Great Britain as a party to the war did in any degree compel these decisions, we might also expect to find at the same era some relaxation on the part of that country relative to the doctrine of contraband, upon which the convention of the armed neutrality contained the most direct stipulations which the northern powers were particularly interested to enforce. Yet such was not the fact. But in addition to this and other considerations of a similar description, it is natural to inquire why it happened that, if the lords of appeal were satisfied that Great Britain possessed the right in question, they recorded and gave to the world a series of decisions against it, founded not upon *British orders of council*, gratuitously relaxing what was still asserted to be the strict right (as in the late war) but upon general principles of public law. However prudence might have required (although there is no reason to believe it did require) an abstinence on the part of Great Britain, from the extreme exercise of the right she had been supposed to claim, still it could not be necessary to give to the mere forbearance of a claim the stamp and character of a formal admission that the claim itself was illegal and unjust. In the late war, as often as the British government wished to concede and relax, from whatever motive, on the subject of the colony trade of her opponents, an order of council was resorted to, setting forth the nature of the concession or relaxation upon which the courts of prize were afterwards to found their sentences ; and, undoubtedly, sentences so passed, cannot, in any fair reasoning, be considered as deciding more than that the order of council is obligatory on the courts, whose sentences they are. But the decrees of the lords of appeal, in and after the American war, are not of this description ; since there existed no order of council on the subject of them ; and of course they are, and ought to be, of the highest weight and authority against Great Britain, on the questions involved in and adjudged by them.

This solemn renunciation of the principle in question, in the face of the whole world, by her highest tribunal in matters of prize, reiterated in a succession of decrees, down to the year 1786,

and afterwards, is powerfully confirmed by the acquiescence of Great Britain, during the first most important and active period of the late war, in the free and unlimited prosecution by neutrals of the whole colony trade of France ; she did, indeed, at last prohibit that trade by an instruction unprecedented in the annals of maritime depredation ; but the revival of her discarded rule was characterized by such circumstances of iniquity and violence, as rather to heighten, by the effect of contrast, the veneration of mankind for the past justice of her tribunals.

The world has not forgotten the instruction to which we allude, or the enormities by which its true character was developed. Produced in mystery, at a moment when universal confidence in the integrity of her government had brought upon the ocean a prey of vast value and importance ; sent abroad to the different naval stations, with such studied secrecy that it would almost seem to have been intended to make an experiment how far law and honour could be outraged by a nation proverbial for respecting both ; the heralds, by whom it was first announced, were the commanders of her commissioned cruisers, who at the same instant carried it into effect with every circumstance of aggravation, if of such an act there can be an aggravation. Upon such conduct there was but one sentiment. It was condemned by reason and justice. It was condemned by that law which flows from and is founded upon them ; it was condemned, and will for ever continue to be condemned, by the universal voice of the civilized world. Great Britain has made amends, with the good faith which belongs to her councils, for that act of injustice and oppression ; and your memorialists have a strong confidence that the late departure from the usual course of her policy will be followed by a like disposition to atonement and reparation. The relations which subsist between Great Britain and the United States rest upon the basis of reciprocal interests, and your memorialists see in those interests, as well as in the justice of the British government and the firmness of our own, the best reasons to expect a satisfactory answer to their complaints, and a speedy abandonment of that system by which they have been lately harassed and alarmed.

Your memorialists will not trespass upon your time with a recital of the various acts by which our coasts, and even our ports and harbours, have been converted into scenes of violence and depredation ; by which the security of our trade and property has been impaired ; the rights of our territory invaded ; the honour of our country humiliated and insulted ; and our gallant countrymen oppressed and persecuted. They feel it to be unnecessary to ask that the force of the nation should be employed in repelling and chastizing the lawless freebooters who have dared to spread their ravages even beyond the seas which form the principal theatre of their piratical exertions, and to infest our shores with their irregular and ferocious hostility.

These are outrages which have pressed themselves in a peculiar manner upon the notice of our government, and cannot have failed to excite its indignation, and a correspondent disposition to prevent and redress them.

Such is the view which your memorialists have taken, in this anxious crisis of our public affairs, of subjects which appear to them, in an alarming degree, to affect their country and its commerce, and to involve high questions of national honour and interest, of public law and individual rights, which imperiously demand discussion and adjustment. They do not presume to point out the measures which these great subjects may be supposed to call for. The means of redress for the past and security for the future are respectfully, confidently submitted to your wisdom ; but your memorialists cannot forbear to indulge a hope, which they would abandon with deep reluctance, that they may yet be found in amicable explanations with those who have ventured to inflict wrongs upon us, and to advance unjust pretensions to our prejudice.

Baltimore, Jan. 21, 1806.

Nº. III.

PRIVATE CORRESPONDENCE WITH MR. MADISON.

Mr. PINKNEY to Mr. MADISON.

Private.

"LONDON, June 29th, 1808.

"DEAR SIR,—I had a long interview this morning with Mr. Canning, which has given me hopes that the object mentioned in your letter of the 30th of April,* (a duplicate by the packet, for the St. Michael has not yet arrived,) may be accomplished, if I should authorize the expectation which the same letter suggests.† Some days must elapse, however, before I can speak with any certainty on the subject. The St. Michael will probably have arrived before that time, and will furnish me with an opportunity of giving you not only the result but the details of what has passed and may yet occur. I beg you, in the mean time, to be assured that the most effectual care shall be taken to put nothing to hazard, and to avoid an improper commitment of our government.

"I was questioned on the affair of the Chesapeake. There seems to be a disposition here to consider the *amende honorable* as already made, in a great degree at least, by Mr. Rose's mission; but I am strongly inclined to think that it will not be difficult to induce them to renew their overture in the same manner, on terms more conformable with the views which you very justly take of

* The repeal of the Orders in Council.

† The repeal of the Embargo.

this interesting subject. I was told (it was not said officially) that the persons taken out of the Chesapeake would be readily restored. The punishment of the officer (otherwise than by his recall, which has been done) will, perhaps, form the greatest embarrassment; but I will endeavour to ascertain informally what will be done on that and every other part of the case. My sole object will be, of course, to lead them, as occasion offers, (as far as in my power,) to do what they ought, in the way most for our honour. I can the more properly do this now, as Mr. Canning has himself proposed the subject to me as intimated above."

Mr. PINKNEY to Mr. MADISON.

Private.

"BRIGHTON, July 10th, 1808.

"DEAR SIR,—I had the honour to write you a short letter, by Mr. Temple Bowdoin, dated, I think, on the 29th of last month, of which (not having it here) I cannot now send a duplicate. It stated that I had received by the British packet a duplicate of your despatch by the St. Michael—that I had just had an interview with Mr. Canning—and that there was reason to believe that the object mentioned in that despatch might be accomplished upon my authorizing the expectation which it suggests. It was arranged between Mr. Canning and myself that another interview should take place about this time, and that he should send me a private note to Brighton, (where I am come for a few weeks on account of my health,) appointing a day for that purpose. I have not yet received this note; but am confident I shall have it to-morrow or next day. I shall set out for London the moment it reaches me.

"I stated in the letter, abovementioned, that I was told by Mr. Canning (*extra officially*) that there would be no objection here to restore the men taken from the Chesapeake; and I suggested a hope that (except as to the punishment of Berkeley) there would not be much difficulty in inducing them to propose in a proper manner suitable reparation for that aggression. This matter I will endeavour to ascertain fully at our next meeting.

"I write this with the view of sending it by the packet. Newspapers have been and will be sent by other opportunities. They

are highly interesting with reference to Spain. I enclose a part of Cobbett's Register of last night, (the residue will go with the packets of newspapers,) containing the British order in council that hostilities shall cease with Spain, &c., and the prorogation speech."

Mr. PINKNEY to Mr. MADISON.

Private.

" August 17th, 1808.

" DEAR SIR,—I omitted to mention in my late letters that, at my second interview with Mr. Canning, he suggested incidentally that the late orders in council, or proclamation relative to Spain opened the ports of that country, not in the occupation of France, to a direct trade between those ports and the United States.

" As I had, in view a complete revocation of the orders of January and November, 1807, and the orders founded upon them, I did not think it right to appear to attach any importance to this suggestion, very carelessly thrown out, by asking explanations; and I was the less inclined to do so, as I still adhered to my opinion that there could be no compromise with their present system.

" The same reasons (and others, indeed, with which it is not necessary to trouble you) prevented me, even after my last interview with Mr. Canning, from inviting any formal assurances on this point; but, as the real effect of the orders or proclamation of the 4th of July began to be doubted, and it might be desirable to have those doubts removed, I did not think it improper to encourage an application on the subject to the Board of Trade by some merchants in the city.

" You will find a copy of their inquiries (less extensive than they ought too have been) and of the answers of the Board in the newspapers of yesterday, from which it appears,

" 1. That American vessels may proceed from a port in the United States with a cargo the produce of the United States, or colonial produce if not of the enemies' colonies, direct to any port in Spain or Portugal not in the possession or under the control of the enemies of Great Britain, and return back to the

United States direct with a cargo the growth or produce of Spain or Portugal.

"2. That an American vessel, having entered a port in Spain previous to the commencement of hostilities by the Patriots against France, may proceed from such port with a cargo, the growth and produce of Spain, direct to a port of the United States, *unless the vessel entered in breach of the Orders in Council.*

"You will observe that the answers are strictly confined to the points proposed by the questions; but it would seem that from these explanations others necessarily follow."

* * * * *

Mr. PINENEY to Mr. MADISON.

Private.

"LONDON, Sept. 10th, 1808.

"DEAR SIR,—I intended to have enclosed in my private letter of the 7th, by Mr. Bethune, who left town on the evening of that day for Falmouth, to embark in the B. Packet, a triplicate of my public letter of the 4th of August, but in my hurry I omitted it. I transmit it now by Mr. Young, our consul at Madrid, who is about to sail from Gravesend for New-York, and I beg to renew my request that the slight variations from the original and duplicate, which you will find in the lines marked in the margin with a pencil, may be adopted. The only one of these corrections, however, about which I am in the least anxious, is in the fourth paragraph from the end, which in my rough draft reads thus, "at the close of the *interview*, I observed, that, as the footing upon which this *interview* has, &c." This awkward iteration of the word *interview*, (if not actually avoided in the original and duplicate, as perhaps it is,) I really wish corrected.

"Mr. Canning's reply to my note not making its appearance, I went this morning to Downing-street to inquire about it; but both Mr. Canning and Mr. Hammond were in the country. I shall not omit to press for the answer (without, however, giving unnecessary offence) until I obtain it, or have the delay explained. It is possible that, when received, it may be found to adopt our proposal, and that they are merely taking time to connect with

their compliance a long vindication of their orders. This is one way of accounting for the delay.

“It is also possible that they are actually undecided, and that they wish to procrastinate and keep back their answer until they can understand by the B. Packet (expected very soon) the workings of the embargo, and of the Spanish views in America; until they can take measure of our elections; until they can ascertain what is to be the course of France towards us; until the state of Europe, so flattering to their hopes, shall improve yet more, or at any rate be past the danger of a relapse, &c. &c. All this is *possible*; but I continue to think that they will reject what I have proposed. Their present *elevation* is exactly calculated (aided by false estimates of America) to mislead them to such a conclusion. They are hardly in a temper of mind to appreciate the motives of the President’s conduct. The chances are that they will ascribe the assurances I have been authorized to give them, as to the embargo law, to a mere anxiety to get rid of that law; and that they will only see in those assurances a pledge that we are heartily tired of our actual position, and are ready to abandon it at any rate. They will be apt, in a word, to presume (believing, as I am sure they do, that we will not venture upon extremities with them) that, by holding off, they will compel us to retract our late measures (the most wise and honourable ever adopted by a government) and to fall at their feet. You must not be surprised if they should be found to expect even more than this from the pressure of the embargo. I allude to the influence which *many* hope it will have upon our elections, in bringing about a change of *men* as well as of *measures*. In this I trust they will be signally disappointed.

If (party spirit out of the question) the conduct of our government towards the two powers that keep the world in an uproar with their quarrel has been *really* disapproved in the United States, the overture just made to both cannot fail to subdue it. I anticipate from it a perfect union of sentiment in favour of any attitude which it may be necessary to take. It puts us so unequivocally in the right, that, although we were not, I think, bound to make it, it is impossible not to rejoice that it has been made. In any event it must be salutary and must do us honour. The

overture, however, would seem to be more advantageous to Great Britain than France. For if you should take off the embargo as to France and continue it as to Great Britain, your proceeding would have little substance in it, considered as a benefit to France, *unless and until you went to war against Great Britain*. But the converse of this would have a vast effect in favour of Great Britain, whether you went to war with France or not.

“It does not follow, and certainly is not true, that the overture is for that reason unjust to France; although I think it the clearest case in the world that Great Britain is (at least) *in pari delicto* with France on the subject of that code of violence which drives neutrals from the seas and justice from the world.

“It is said here, by those who affect to know, that a conciliatory conduct by France towards the United States will not be acceptable to this government; and certainly Marriott’s book affords some reason for suspicion that a repeal of the French decrees would not be followed by that of the British orders. Such infatuation is scarcely credible, yet it would not be much worse than their present backwardness to avail themselves of what has lately been said to them.

“After all, it will be safest (for a time longer) to keep opinion as much as possible in suspense—and I need not repeat my assurances that the moment I receive the information I am expecting, no effort shall be spared to put you in possession of it.”

Mr. PINKNEY to Mr. MADISON.

Private.

“LONDON, Sept. 21, 1808.

“DEAR SIR,—The Hope arrived at Cowes from France the 13th.

“Not having heard from Mr. Canning, although he returned to London the 16th, I called again yesterday at Downing-street, and was assured that the answer to my note would be sent to-night or early to-morrow morning. Mr. Atwater will of course be able to leave town on Friday, and embark on Saturday with a copy of it.

“I have been told since the arrival of the last British packet (but do not believe it) that there is more probability than I had

anticipated, that the late events in Spain and Portugal (which ought not to be considered as *deciding* any thing) will have an effect on public opinion in America against the continuance of the embargo, and favourable to all the purposes of Great Britain. If this were true, I should think it was deeply to be lamented. I may misunderstand the subject; but I cannot persuade myself that any thing that has happened on this side of the Atlantic, ought to induce us in any degree to retreat from our present system.

“ If we should resolve to trade with Spain and Portugal (Great Britain and France persisting in their orders and decrees) in any way to which Great Britain would not object, we must suspend the embargo as to those countries only, or as to those countries and *Great Britain*, or we must repeal it altogether.

“ The temptation to the first of these courses is, even in a commercial sense, inconsiderable—the objection to it endless. The object to be gained (if no more was gained than ought to be gained) would be trifling. There could indeed be no gain. An inadequate market redundantly supplied would be more injurious than no market at all; it would be a lure to destruction and nothing more. A suspension of the embargo, so limited in its nature as this would be (supposing it to be in fact what it would be in form) would have a most unequal and invidious operation in the different quarters of the Union, of which the various commodities would not in the ports of Portugal and Spain be in equal demand.

“ A war with France would be inevitable—and such a war, (so produced) from which we could not hope to derive either honour or advantage, would place us at the mercy of Great Britain, and on that account would in the end do more to cripple and humble us, than any disaster that could otherwise befall us.

“ The actual state of Spain and Portugal is moreover not to be relied upon. My first opinion on that subject remains; but even the most sanguine will admit that there is great room for doubt. The Emperor of France is evidently collecting a mighty force for the reduction of Spain; and Portugal must share its fate. And even if that force should be destined (as some suppose) first to contend with Austria, the speedy subjugation of

Spain is not the less certain. If France should succeed, Spain and Portugal would again fall under the British orders of November, as well as under the operation of the French decrees. Our cargoes would scarcely have found their way to the ocean in search of the boasted market, before they would be once more in a state of prohibition, and we should in the mean time have incurred the scandal of suffering an improvident thirst of gain to seduce us from our principles into a dilemma presenting no alternative but loss in all the senses of the word.

“ But it is not even certain what Great Britain would herself finally say to such a partial suspension of the embargo. She would doubtless at *first* approve of it. But her ultimate course (especially if war between France and the United States were not the immediate consequence, or if the measure were eventually less beneficial to herself than might be supposed at the outset) ought not to be trusted. That she should approve at first, is hardly to be questioned, and the considerations upon which she would do so, are precisely those which should dissuade us from it. Some of these are—the aid it would afford to her allies, as well as to her own troops co-operating with them, and its consequent tendency to destroy every thing like system in our conduct—its tendency to embroil us with France, its tendency to induce us, by overstocking a limited market, to make our commodities of no value—to dissipate our capital—to ruin our merchants without benefiting our agriculture—to destroy our infant manufactures without benefiting our commerce—its tendency to habituate us to a trammelled trade, and to fit us for acquiescence in a maritime despotism. But there are other reasons—our trade with Spain and Portugal, while it lasted, would be a circuitous one with *Great Britain and her colonies*, for their benefit. Our productions would be carried in the first instance to Spain and Portugal, would be bought there for British account, and would find their way to the West Indies or centre here, as British convenience might require, and thus in effect the embargo be removed as to Great Britain, while it continued as to France, and we professed to continue it as to both. And if any profits should arise from this sordid traffic, they would become a fund, to enable us to import into the United States directly or indirectly the

manufactures of Great Britain, and thus relieve her in another way, while her orders would prevent us from receiving the commodities of her enemy. It would be far better openly to take off the embargo as to Great Britain, than while affecting to continue it as to that power to do what must rescue her completely (and that too without advantage to ourselves) from the pressure of it, at the same time that it would promote her views against France in Portugal and Spain.

“ As to withdrawing the embargo as to Great Britain, as well as Spain and Portugal, while the British orders are unrepealed, the objections to that course are just as strong now as they were four months ago. The change in Spain and Portugal (if it were even likely to last) cannot touch the principle of the embargo, as regards Great Britain, who re-asserts her orders of November, in the very explanations of the 4th July, under which we must trade with those countries, if we trade with them at all. If we include Great Britain in the suspension, and exclude France, we do now what we have declined to do before, for the sake of a delusive commerce, which may perish before it can be enjoyed, and cannot in any event be enjoyed with credit, with advantage, or even with safety. We take part at once with Great Britain against France, at a time the least suited that could be imagined to such a determination, at a time when it might be said we were emboldened by French reverses, to do what before we could not resolve upon, or even tempted by a prospect of a scanty profit, exaggerated by our cupidity and impatience to forget what was due to consistency, to character and permanent prosperity. We sanction too the maritime pretensions which insult and injure us ; we throw ourselves, bound hand and foot, upon the generosity of a government that has hitherto refused us justice, and all this when the affair of the Chesapeake, and a host of other wrongs, are unredressed, and when Great Britain has just rejected an overture which she must have accepted with eagerness if her views were not such as it became us to suspect and guard against.

To repeal the embargo altogether would be preferable to either of the other courses, but would notwithstanding be so fatal to us in all respects, that we should long feel the wound it would inflict, unless indeed some other expedient, as strong at least and

as efficacious in all its bearings, can (as I fear it cannot) be substituted in its place.

“ War would seem to be the unavoidable result of such a step. If our commerce should not flourish in consequence of this measure, nothing would be gained by it but dishonour ; and how it could be carried on to any valuable purpose it would be difficult to show. If our commerce *should* flourish in spite of French and British edicts, and the miserable state of the world, in spite of war with France, if that should happen, it would, I doubt not, be assailed in some other form. The spirit of monopoly has seized the people and government of this country. We shall not under any circumstances be tolerated as rivals in navigation and trade—it is in vain to hope that Great Britain will voluntarily foster the naval means of the United States. All her prejudices—all her calculations are against it. Even as allies we should be subjects of jealousy. It would be endless to enumerate in detail the evils which would cling to us in this new career of vassallage and meanness, and tedious to pursue our backward course to the extinction of that very trade to which we had sacrificed every thing else.

“ On the other hand, if we persevere we must gain our purpose at last. By complying with the little policy of the moment, we shall be lost. By a great and systematic adherence to principle, we shall find the end to our difficulties. The embargo and the loss of our trade are deeply felt here, and will be felt with more severity every day. The wheat harvest is like to be alarmingly short, and the state of the continent will augment the evil. The discontents among their manufacturers are only quieted for the moment by temporary causes. Cotton is rising, and soon will be scarce. Unfavourable events on the continent will subdue the temper unfriendly to wisdom and justice which now prevails here. But above all, the world will I trust be convinced that our firmness is not to be shaken. Our measures have not been without effect. They have not been *decisive*, because we have not been thought capable of persevering in self denial, if that can be called self denial which is no more than prudent abstinence from destruction and dishonour.

“ I ought to mention that I have been told by a most respectable American merchant here, that large quantities of such woollen cloths as are prohibited by our non-importation act, have been and continue to be sent to Canada, with the view of being smuggled into the United States.

“ I beg you to excuse the frequency and length of my private letters.

“ I need not tell you that I am induced to trouble you with my hasty reflections, because I think you stand in need of them. I give them merely because I believe that you are entitled to know the impressions which a public servant on this side of the water receives from a view of our situation.”

“ P. S. *Sept. 24th.* Mr. Canning’s answer received last night confirms all my late anticipations. It is a little extraordinary that if a written proposal was required from me *with the idle motive mentioned in the accompanying papers*, no such motive was suggested at the time, and even that other motives *were* suggested. The fact probably is that they wished to evade the overture, and hoped that it would not be formally made. Being made it was difficult to dispose of it, and hence the delay. Before any public use is made of Mr. Canning’s statement, I should wish my reply to be received.”

[In order to understand the above passage, it is necessary to observe, that Mr. Canning in a letter accompanying his note of the 23d September, 1808, in reply to Mr. Pinkney’s overture on the subject of the repeal of the orders in council, had stated, as a reason for requiring their communications to be in writing, the misrepresentation which had taken place in America of former conferences between them, at the same time adding ; “ You gave me on that occasion the most satisfactory proof that such misrepresentation did not originate with you, by communicating to me that part of your despatch, in which the conferences particularly referred to were related, and related correctly ; but this very circumstance, while it establishes your personal claim to entire confidence, proves, at the same time, that a faithful report of a conference on your part, is not a security against its misre-

presentation." In his reply to this letter, Mr. Pinkney observed, that no person could be less disposed than he was to find fault with the object of Mr. Canning's letter, which appeared to be to guard against all misrepresentation of what had passed in their late interviews "beyond what you find recorded in my note. You have told me that I have, personally, no concern in that object, and I did not require to be told that my government has as little. I understand, indeed, that the circumstance which has suggested a peculiar motive for this proceeding was one of those newspaper misrepresentations which every day produces where the press is free, which find no credit and beget no consequence, and for which it is greatly to be feared your expedient will provide no remedy. Of my conduct, when that circumstance occurred, in giving you unsolicited proofs that I had transmitted to Mr. Secretary Madison a faithful report of our conferences, mistaken by public rumour or private conjecture, it is not necessary for me to speak, for you have yourself done justice to it."

[The following extracts from Mr. Pinkney's official reply to Mr. Canning's letter, seem also to be necessary to the understanding of the remarks which he afterwards makes upon it in a private letter to Mr. Madison. He recapitulates what had passed in conference between him and Mr. Canning, and states in a condensed form the arguments by which he supported the proposal he had made.]

"I meant to suggest, then, that upon your own principles it would be extremely difficult to decline my proposal; that your orders inculcate, as the duty of neutral nations, resistance to the maritime decrees of France, as overturning the public law of the world, and professedly rely upon that duty, and an imputed abandonment of it for their inducement and their justification; that of those orders, that of the 7th of January, 1807, (of which the subsequent orders of November are said, in your official reply to my note of the 23d of August, to be only an extension, ("an extension in operation not in principle,") was promulgated and carried into effect a few weeks only after the Berlin decree had made its appearance, when the American government could

not possibly know that such a decree existed, when there had been no attempt to enforce it, and when it had become probable that it would not be enforced at all, to the prejudice of neutral rights; that the other orders were issued before the American government, with reference to any practical violation of its rights, by an attempt to execute the Berlin decree in a sense different from the stipulations of the treaty subsisting between the United States and France, and from the explanations given to General Armstrong by the French Minister of Marine, and afterwards impliedly confirmed by M. Champagny, as well as by a correspondent practice, had any sufficient opportunity of opposing that decree, otherwise than as it did oppose it; that your orders, thus proceeding upon an assumed acquiescence not existing in fact, retaliated prematurely, and retaliated a thousand fold, through the rights of the United States, wrongs rather threatened than felt, which you were not authorized to presume the United States would not themselves repel, as their honour and their interests required; that orders, so issued, to say the least of them, were an unseasonable interposition between the injuring and the injured party, in a way the most fatal to the latter; that by taking justice into your own hands before you were entitled to do so, at the expense of every thing like neutral rights, and even at the expense of other rights justly the objects of yet greater sensibility, and by inflicting upon neutral nations, or rather upon the United States, the only neutral nation, injuries infinitely more extensive and severe than it was in the power of France to inflict, you embarrassed and confounded, and rendered impracticable, that very resistance which you demanded of us: that very proposal destroyed all imaginable motives for continuing, whatever might have been the motives for adopting, this new scheme of warfare; that it enabled you to withdraw, with dignity and even with advantage, what should not have come between France and us; that its necessary tendency was to place us at issue with that power, or in other words, in the precise situation in which you have maintained we ought to be placed, if it should persist in its obnoxious edicts; that the continuance of our embargo, so modified, would be at least equivalent to your orders; for that, in their most efficient state, your or-

ders could do no more as regards the United States, than cut off their trade with France and the countries connected with her; and that our embargo, remaining as to France and those countries, would do exactly the same; that if the two courses were barely, or even nearly upon a level in point of expediency, Great Britain ought to be forward to adopt that which was consistent with the rights and respectful to the feelings of others; that my proposal, however, had powerful recommendations which the orders in council had not; that it would re-establish, without the hazard of any disadvantage, before new habits had rendered it difficult, if not impossible, a traffic which nourished your most essential manufactures, and various other important sources of your prosperity; that it would not only restore a connexion valuable in all its views, but prepare the way for the return of mutual kindness for adjustments greatly to be desired—and in a word, for all those consequences which follow in the train of magnanimity and conciliation, associated with prudence and justice.

“ Among the observations intended to illustrate my opinion of the certain, probable and possible effects of the concurrent acts which my proposal had in view, were those to which you allude in the sixth paragraph of your letter. Having stated that renewed commercial intercourse between Great Britain and the United States would be the first effect, I remarked in the progress of the conversation, that the edicts of France could not prevent that intercourse, even if France should adhere to them; although Great Britain, by her superior naval means, might be able to prevent the converse of it; that the power of France upon the seas was in no degree adequate to such a purpose; and if it were otherwise, that it was not to be supposed that the United States, resuming their lawful commerce with this country after the recall of the British orders in council, would take no measures against systematic interruptions of that commerce by force and violence, if such should be attempted.

“ If, when I was honoured by the different interviews before mentioned, I had been able to conjecture the nature of the arguments which were to have an influence against my proposal, as I now find them stated in your answer to my note, I should probably have ventured to suggest, in addition to the remarks actually

submitted to your consideration, that if "the blockade of the European continent," by France and the powers subservient to, or in combination with her, to which your orders, as "a temperate but determined retaliation," were opposed, has been "raised even before it has been well established," and if "that system" so opposed, "of which extent and continuity were the vital principles, has been broken up into fragments utterly harmless and contemptible," there seems scarcely to be left, in your own view of the subject, any intelligible justification for perseverance in such of the retaliatory measures of Great Britain, as operate through the acknowledged rights of a power confessedly no party to that combination, and ready to fulfil her fair neutral obligations, if you will suffer her to do so. Under such circumstances, to abandon what is admitted to have lost its only legitimate object, is not "concession;" it is simple justice. To France, indeed, it might be concession. But it is not France, it is the government of America, neither subservient to France nor combined with France, a third party, whose rights and interests your orders deeply affect without any adequate necessity, according to your own showing, that requires their recall, and that too upon terms which cannot but promote the declared purposes of those orders, if any remain to be promoted. I say "without any adequate necessity, according to your own showing;" for I am persuaded, Sir, you do not mean to tell us, as upon a hasty perusal of your answer to my note might be imagined, that those rights and interests are to be set at nought, lest "a doubt should remain to distant times of the determination and the ability of Great Britain to have continued her resistance," or that your orders may indefinitely give a new law to the ocean, lest the motive to their repeal should be mistaken by your enemy. If this might, indeed, be so, you will permit me to say that, highly as we may be disposed to prize the firm attitude and vast means of your country at this eventful moment, it would possibly suggest to some minds a reluctant doubt on the subject of your observation, "that the strength and power of Great Britain are not for herself only, but for the world."

"I might also have been led to intimate that my proposal would apparently lose nothing by admitting that, "by some unfortunate concurrence of circumstances, without any hostile inten-

tion, the American embargo did come in aid of "the before mentioned blockade of the European continent, precisely at the very moment when, if that blockade could have succeeded at all, this interposition of the American government would most effectually have contributed to its success." Yet I should probably have thought myself bound to remind you that, whatever may be the truth of this speculation, the same embargo withheld our tonnage and our productions from that communication with the colonies of your enemies and with the European continent, which you had asserted your right to prevent; which, as a direct communication, (with the continent) you had in fact prohibited; which, even through British ports, or in other qualified forms, you had professed to tolerate, not as that which could be claimed, but as an indulgence that could at any time be withdrawn; which, as a traffic for the United States to engage in, you had at least discouraged, not only by checks and difficulties in the way of its prosecution, but by manifesting your intention to mould it into all the shapes which the belligerent, fiscal, or other peculiar policy of Great Britain might require, and to subject it to the exclusive jurisdiction of her municipal code, armed with all the prerogatives of that universal law to which nations are accustomed to look for the rights of neutral commerce."

Mr. PINKNEY to Mr. MADISON.

Private.

"LONDON, October 11th, 1808.

"DEAR SIR,—I am not able to judge whether my reply to Mr. Canning's letter (enclosed in my public despatch) will be approved by the President. I need not say that I hope it will. At any rate it can do no harm, as it is simply my act. What will be its reception here I know not. If ill received, as perhaps it may be, although perfectly polite, it can affect only myself. This last reflection suggests another. I can say with perfect truth that I have no desire to remain here a moment longer than I ought. Dispose of me, therefore, as shall be thought best, and do not think that I am inclined to overrate myself, if I add, that I beg you in any event to be assured of my unshaken attachment and best services.

" Mr. Canning's answer to my note and the accompanying letter will, no doubt, be well considered and thoroughly understood. I may misconceive them, but I suppose them to be at once insulting and insidious ; and have endeavoured in my reply to counteract their purposes without giving just cause of offence.

" I need not dissect to you these papers ; but I must make one remark upon them. The answer contains an insinuation, scarcely to be mistaken, that our embargo was concerted with France,* and the letter endeavours to provide evidence of that concert by its account of what I said to Mr. Canning upon the nature and origin of the embargo. It has always, as you know, been a favourite purpose here to make out that the President knew nothing of the British orders of November, at the date of the message recommending that measure. The inference from this fact once established, would be, among other things, that there could be no inducement for *including Great Britain* in the embargo but an attachment to the French system of " a blockade of the continent." You will find, if occasion should arrive, that we shall be accused by this government, much more distinctly than in Mr. Canning's paper, of having been parties to

* " The government of the United States is not now to be informed that the Berlin decree of November 21st, 1806, was the practical commencement of an attempt, not merely to check or impair the prosperity of Great Britain, but utterly to annihilate her political existence, through the ruin of her commercial prosperity ; that in this attempt almost all the powers of the European continent have been compelled, more or less, to co-operate ; and that the American embargo, though most assuredly not intended to that end, (for America can have no real interest in the subversion of the British power, and her rulers are too enlightened to act from any impulses against the real interest of their country,) but by some unfortunate concurrence of circumstances, without any hostile intention, the American embargo did come in aid of the " blockade of the European continent," precisely at the very moment when, if that blockade could have succeeded at all, this interposition of the American government would most effectually have contributed to its success.

" To this universal combination, his Majesty has opposed a temperate, but a determined retaliation upon the enemy ; trusting that a firm resistance would defeat this project, but knowing that the smallest concession would infallibly encourage a perseverance in it."

what that paper calls the "*universal combination*." I have thought it my indispensable duty to repel in few words the above insinuation without appearing to understand it, and, in order to defeat the intended proof of it, to state explicitly what I really did say to Mr. Canning about the embargo. You will, I am persuaded, be of opinion that the course I have pursued was absolutely forced upon me. Nothing could be more disagreeable than such a discussion ; but I think I should have forgotten what was due to my country's honour, as well as to my own, if I had declined it.*

* " My suggestions were to the following effect: that I believed that no copy of your orders of November had arrived in the United States at the date of the President's message ; that a recent change in the conduct of France to our prejudice did appear to be known ; that intelligence had been received, and a belief entertained of your intention to adopt some further measures as a measure of retaliation against France, by which our commerce and our rights would be affected ; that there was reason to conclude that you had actually adopted such a measure ; that (as I collected from American newspapers) this had appeared from private letters and the newspapers of this country received in the United States some days before the message of the President, and probably known to the government ; that, in a word, various information concurred to show that our trade was likely to be assailed by the combined efforts of both the belligerent parties ; and that the embargo was a measure of wise and peaceful precaution, adopted under the view of reasonably anticipated peril."

[The nature of the evidence upon which the embargo was recommended in the President's message to Congress of the 18th Dec. 1807, is not stated so strongly by Mr. Pinkney in the above extract as it might have been, had he known at the time all the facts connected with it. I have been informed from the highest authority that a copy of the British orders in council of November 11th, 1807, as printed in an English newspaper, stating them to be ready in that form to be signed and issued, was actually lying on the President's table at the time when the message was sent. Besides the precise warning contained in the newspaper, it was generally understood that some such measure was contemplated by the British cabinet. Among other grounds for this belief was the following passage in a private letter to Mr. Madison, of October 5, 1807, from a very intelligent and close observer in London of the indicated views of the cabinet towards this country: " The Gazette of Saturday has gone by without announcing the injurious blockade of all French ports and all ports under the

"I look with anxiety for the packet. It will not, I trust, appear that we are ready to submit to what Great Britain now declares to be her determination, notwithstanding that "his Majesty would gladly facilitate the removal of the American Embargo *as a measure of inconvenient restriction upon the American people !*"

"I send you English newspapers, and the 1st and 2d parts of vol. VI. of Robinson's Admiralty Reports."

influence of France, which was threatened all the week, and very generally expected." Another letter from the same of Oct. 11th, adds, "two more Gazettes have been published without announcing the rigorous blockade, one of them as late as last night. I hope they have thought better of it."

Although it is true therefore that no official evidence existed in this country of the orders in council when the embargo was recommended, there was a moral certainty in this evidence, connected with all the facts and circumstances referred to by Mr. Pinkney, and more distinctly enumerated by Mr. Brougham in his speech on the orders in council, which warranted the measure, and which was so speedily confirmed by official intelligence. To this view of the case the language of the message was accommodated, and the subsequent message of February 2, 1808, founded on official information of the orders, comports with the idea that they had been unofficially known when the provident measure of the embargo was recommended. Speaking of the circumstances under which the measure was adopted, Mr. Brougham remarks : " If it be said that this measure of embargo was adopted suddenly (a charge which I think cannot be attributed to it) I answer that if it was to be done at all, it behoved to be done with vigour and promptitude, the very moment the government of that country perceived that it was called for by the measures which we had adopted. As soon as this unexampled attack upon their navigation, and encroachment upon their privileges was known, nay, the instant that this unheard of aggression was suspected to be in our contemplation, the United States were obliged, not to resent it, indeed, for it had not yet attacked them; but at least to provide against its certain effects by some measure of precaution. Therefore I say let it not be argued that the suddenness of this precautionary measure, a measure in its very nature sudden and applicable to an unexpected and pressing emergency, affords any ground for believing that the orders in council were not the occasion of it."]

Mr. PINKNEY to Mr. MADISON.

Private.

"LONDON, November 2d, 1808.

"DEAR SIR,—You will have discovered some weeks ago, that the hope which I had entertained of a satisfactory issue of my discussion with Mr. Canning was unfounded. I trust it will be thought that the experiment has been completely made, and that no clue can be found to maintain that every thing has not been done to render our overture acceptable. I tried it in every shape, and endeavoured to recommend it in every mode, even at the hazard of indiscretion, in vain. Nothing could have been more unexpected than Mr. Canning's letter to me, accompanying the official answer, which I am sure you will understand, to my proposal. I feel that it is not such a letter as I could have persuaded myself to write in similar circumstances. That feeling is sufficiently manifest in my reply; which, nevertheless, I believe to be so carefully polite that it cannot be deemed to be in any respect out of rule.

"You will observe that in my official note of the 23d of August, as well as in the last mentioned paper, I have had in view Mr. Canning's speech of the 24th of June, to which your private letter alludes. Whether his speech be correctly reported I know not; but his letter to me of the 23d of September, (which will not, I am confident, bring any accession of honour to him,) renders it quite probable."

* * * * *

Mr. MADISON to Mr. PINKNEY.

Private.

"WASHINGTON, November 9th, 1808.

* * * * *

"The conduct of the British cabinet in rejecting the fair offer made to it, and even sneering at the course pursued by the United States, prove at once a very determined enmity to them, and a confidence that events were taking place here which would relieve it from the necessity of procuring a renewal of commercial

intercourse by any relaxation on its part. Without this last supposition it is difficult to believe that, with the prospects at home and abroad in Europe, so great a folly would have been committed. As neither the public nor Congress have yet had time to disclose the feelings which result from the posture now given to our relations with Great Britain, I cannot speak positively on that subject. I shall be much disappointed, however, if a spirit of independence and indignation does not strongly reinforce the past measures with others which will give a severity to the contest of privations at least, for which the British government would seem to be very little prepared in any sense of the word. It was perhaps unfortunate, that all the intelligence from this country, previous to the close of your correspondence with Mr. Canning, was from a quarter and during a period most likely to produce miscalculations of the general and settled dispositions. You will see in the newspapers sufficient evidence of the narrow limits to which discontent was confined, and it may reasonably be expected that the counter-current will be greatly strengthened by the communications now going forth to the public.

“ Among the documents communicated *confidentially* to Congress, I hope you will excuse us for including (with the exception of some small passages) your private letter of Sept. 21.* The excellent views which it appeared to take of our affairs with Great Britain, were thought to justify the liberty. They coincided indeed so entirely with the sentiments of the executive, and were so well calculated to enlighten the legislative body, that it was confidently presumed the good effect would outweigh the objections in the case. A like liberty was taken with a private letter from General Armstrong.”

* * * * *

Mr. MADISON to Mr. PINKNEY.

“ WASHINGTON, Dec. 5th, 1803.

“ DEAR SIR,—I have little to add to the printed communication accompanying my official letter of this date. Congress,

* See page 402.

seems to be sufficiently determined, as you will perceive, to resist the unjust and insulting edicts of the belligerents, and differ only as to the mode best suited to the end. The disposition to prefer war to the course hitherto pursued, is rather gaining than losing ground, and is even promoted by the efforts of those most opposed to war with Great Britain, who concur in deciding against submission, and at the same time contend that withdrawing from the ocean is submission. It is very questionable, however, whether a preference of war to be commenced within the present session, is so general in Congress, or so much looked for by the nation, as to recommend the measure. Whether, in case the measure should be declined, any such substitute providing for war during the recess, as I have intimated in one of my last letters, will be acceptable, is more than I can undertake to say, nothing of the sort having been brought into conversation.

"I find by conversation with Mr. Erskine, that he is himself favourably impressed by the documents laid before Congress as to the fairness of our conduct towards the two belligerents, and that he is willing I should believe that the impression will be the same on his government. As it may be conceived by him, however, to be politic to lull our feelings and suspicions, I am the less sure that he calculates on any change in the councils of his government likely to do justice to those of this government.

"As to the state of the public mind here, you will sufficiently collect it from the printed information now forwarded. I cannot believe that there is so much depravity or stupidity in the eastern States, as to countenance the reports that they will separate from their brethren rather than submit any longer to the suspension of their commerce. That such a project may lurk within a junto, ready to sacrifice the rights, interests, and honour of their country to their ambitious or vindictive views, is not to be doubted; but that the body of an intelligent people, devoted to commerce and navigation, with few productions of their own, and objects of unceasing jealousy to Great Britain on account of their commerce and navigation, should be induced to abandon the southern States, for which they are the merchants and carriers, in order to enter into an alliance with Great Britain, seems to be impossible. What sort of a commercial treaty could be made

between such parties? In truth the obstacles to one between the United States and that nation, arise almost wholly from the patronage by the former of the maritime rights and interests of the eastern States as a portion of the confederacy. A treaty between such parties, if made at all, must be political, not commercial, and have in view modifications of government and aggrandizement of individuals, and not the public good."

Mr. PINKNEY to Mr. MADISON.

Private.

" LONDON, Jan. 16, 1809.

* * * * *

" Mr. Sawyer's communication has been published (for the first time in England) in the *Observer* of yesterday as an *interesting* document. I question much if the daily papers will follow the example.

" I enclose a curious extract from the *Anti-Jacobin Review* and Magazine for November last, brought to me by a friend a few days ago. I have not seen the book itself. *Barr* is at Edinburgh. The enclosed extract of a letter, relative to him, from one of my friends there, may amuse you.

" The late proceedings of the Legislature of Massachusetts surpass my worst expectations:—Those of Congress equal my best. The advantage in debate is triumphantly with the friends of the embargo. The only speech sent to me in a pamphlet, (Mr. Giles',) has been given to a leading member of the House of Lords, together with the published documents, the very able report of the committee of the House of Representatives, and the answer of the majority of the Massachusetts members to the Legislature of that State. I have sent a copy of each of these documents to Gen. Armstrong by a *very uncertain* opportunity, and have distributed the rest among members of Parliament. I wish you had sent me more. Our overture, connected with the late proceedings in Congress and the publication of the correspondence, &c. has *I know* done much good.

" Parliament is about to assemble under the most gloomy auspices. Our affairs will be amply and zealously discussed. I know not how ministers can justify their conduct towards us.

Mr. PINKNEY to Mr. MADISON.

"LONDON, Jan. 23d, 1809.

"DEAR SIR,—I dined at Mr. Canning's with the *corps diplomatique*, on the 18th, the day appointed for the celebration of the Queen's birth-day. Before dinner he came up to me, and, entering into conversation, adverted to a report which he said had reached him, that the American ministers (here and in France) were about to be recalled. I replied that I was not aware that such a step had already been resolved upon. He then took me aside, and observed, that, according to his view of the late proceedings of Congress, the resolutions of the House of Representatives in committee of the whole, appeared to be calculated, if passed into a law, to remove the impediments to an arrangement with the United States upon the two subjects of the orders in council and the Chesapeake—that the President's proclamation had in fact formed the great obstacle to the adoption of what we had lately proposed, and that every body knew that it had formed the sole obstacle to adjustment in the other affair—that the renewal of commercial intercourse with America, while that proclamation remained in force, would have been attended with this *embarrassment*, that British merchant vessels, going into our ports, would have found there the commissioned cruisers of the enemy in a capacity to assail them as soon as they should put to sea; while British armed vessels, having no asylum in those ports, would not have been equally in a situation to afford them protection—that if this was not insisted upon at large in his reply to my official letter of the 23d of August, it was because it was difficult to do so without giving to that paper somewhat of an unfriendly appearance—that as the above mentioned *embarrassment*, produced by the proclamation of the President, and the right which Great Britain supposed she had to complain of the continuance of that proclamation, proceeded, not from the exclusion of British ships of war from American ports, but from the discrimination in that respect between Great Britain and her adversaries; and as the resolutions of the House of Representatives took away that discrimination, although not perhaps in the manner which Great Britain could have wished, they were

willing to consider the law to which the resolutions were preparatory, as putting an end to the difficulties which prevented satisfactory adjustments with us. He then said that they were, of course, desirous of being satisfied by us, that the view which they thus took of the resolutions in question was correct; and he intimated a wish that we should say that the intention of the American government was in conformity with that view. He added that it was another favourable circumstance that the non-importation system was about to be applied to all the belligerents.

As all this occurred rather unexpectedly, (although my reception at court, and other circumstances of much more consequence, had seemed to give notice of *some* change,) and as I did not think it advisable to say much, even informally, upon topics of such delicacy at so short a warning, I proposed to Mr. Canning that I should call on him in the course of a day or two for the purpose of a more free conversation upon what he had mentioned, than was then practicable. To this he readily assented; and it was settled that I should see him on the Sunday following, (yesterday,) at 12 o'clock, at his own house. I thought it prudent, however, to suggest at once, that the resolutions of the House of Representatives struck me as they did Mr. Canning; and (supposing myself to be warranted by your private letter of the 25th of November, in going so far) I added, that although it was evident that if Great Britain and France adhered to their present systems, the resolutions had a necessary tendency to hasten a disagreeable crisis, I was sure that my government, retaining the spirit of moderation which had always characterized it, would be most willing that Great Britain should consider them as calculated to furnish an opportunity for advances to renewed intercourse and honourable explanations.

"The interview yesterday was of some length. An arrangement with me was out of the question. An assurance from me as to the intentions of the American government in passing (if indeed it had passed) an Exclusion and Non-Intercourse law applicable to all the powers at war, was equally out of the question. I had no authority to take any official step in the business; and I should not have taken any, without further instructions from you founded upon the new state of things, even

if my former authority had not been at an end. My object, therefore, was merely to encourage suitable approaches on the part of the government by such unofficial representations as I might be justified in making.

“ I will not persecute you with a detail of my suggestions to Mr. Canning, intended to place the conduct of our government in its true light, and to second the effect which its firmness and wisdom had manifestly produced. It will be sufficient to state that, while I declined (indeed it was not pressed) giving, or allowing Mr. Canning to expect, any such assurances as I had understood him to allude to in our last conversation, I said every thing which I thought consistent with discretion, to confirm him in his disposition to seek the re-establishment of good understanding with us, and, especially to see in the expected act of Congress, if it should pass, an opening to which the most scrupulous could not object, as well as the strongest motives of prudence for such advances, before it should be too late, on the side of this country, as could scarcely fail to produce the best results.

“ It was of some importance to turn their attention here, without loss of time, to the manner of any proceeding which might be in contemplation. It seemed that the resolutions of the House of Representatives, if enacted into a law, might render it proper, if not indispensable, that the affair of the Chesapeake should be settled at the same time with the affair of the orders and the embargo ; and this was stated by Mr. Canning to be his opinion and his wish. It followed that the whole matter ought to be settled at Washington ; and, as this was, moreover, desirable on various other grounds, I suggested that it would be well (in case a special mission did not meet their approbation) that the necessary powers should be sent to Mr. Erskine ; but I offered my intervention for the purpose of guarding them against *deficiencies* in those powers, and of smoothing the way to a successful issue. Mr. Canning gave no opinion on this point.

“ Although I forbear to trouble you in detail with what I said to Mr. Canning, it is fit that you should know what was said by him on every point of importance.

“ In the course of conversation he proposed several questions for reflection, relative to our late proposal, which when that pro-

posals were not even glanced at. The principal were the two following :

“ 1. In case they should now wish, either through me, or through Mr. Erskine, to meet us upon the ground of our late overture, in what way was the effectual operation of our embargo as to France, after it should be taken off as to Great Britain, to be secured ? It was evident, he said, that if we should do no more than refuse clearances for the ports of France, &c., or prohibit, under penalties, voyages to such ports, the effect which my letter of the 21st of August and my published instructions professed to have in view would not be produced ; for that vessels, although cleared for British ports, might, when once out, go to France instead of coming here. That this would in fact be so (whatever the penalties which the American law might denounce against offenders) could not, he imagined, be doubted ; and he presumed, therefore, as he could see no possible objection to it (on our part) that the government of the United States would not, after it had itself declared a commerce with France illegal, and its citizens who should engage in it delinquents, complain if the naval force of this country should assist in preventing such a commerce.

“ 2. He asked whether there would be any objection to making the repeal of the British orders and of the American embargo contemporaneous ? He seemed to consider this as indispensable. Nothing could be less admissible, he said, than that Great Britain, after rescinding her orders, should, for any time, however short, be left subject to the embargo in common with France whose decrees were subsisting, with a view to an experiment upon France, or with any other view. The United States could not upon their own principles apply the embargo to this country one moment after the orders were removed, or decline after that event to apply it exclusively to France and the powers connected with her. Great Britain would dishonour herself by any arrangement which should have such an effect, &c.

“ You will recollect that my instructions (particularly your letter of the 30th of April) had rather appeared to proceed upon the idea that the British orders were to be repealed before the embargo was removed as to England ; and it is probable that a perusal of these instructions had led to Mr. Canning's inquiry.

“ Upon the whole I thought I might presume that this government had at last determined to sacrifice to us their orders in council in the way we had before proposed, (although Mr. Canning once, and only once, talked of *amendment and modification*, which I immediately discouraged, as well as of *repeal*), and to offer the *amende honorable*, in the case of the Chesapeake, provided Congress should be found to have passed a law in conformity with the resolutions of the House of Representatives. I ought to say, however, that Mr. Canning did not precisely pledge himself to that effect ; and that the past justifies distrust. The result of the elections in America—the unexpected firmness displayed by Congress and the nation—the disappointments in Spain and elsewhere—a perceptible alteration in public opinion here since the last intelligence from the United States—an apprehension of losing our market, of having us for enemies, &c., have apparently made a deep impression upon ministers ; but nothing can inspire perfect confidence in their intentions but an impossible forgetfulness of the past, or the actual conclusion of an arrangement with us. In a few days I may calculate upon hearing from you. If Congress shall have passed the expected act, the case to which Mr. Canning looks will have been made, and he may be brought to a test from which it will be difficult to escape. Whatever may be my instructions I shall obey them with fidelity and zeal ; but I sincerely hope they will not make it my duty to prefer adjustment *here* to adjustment in Washington. I am firmly persuaded that it will be infinitely better that the business should be transacted immediately with our government ; and, if I should be at liberty to do so, I shall continue to urge that course.

“ You will not fail to perceive that the ground upon which it is now pretended that our proposition of last summer was rejected, is utterly inconsistent with Mr. Canning’s note, in which that proposition is distinctly rejected upon other grounds, although in the conclusion of the note, the President’s proclamation is introduced *by the bye*. Besides, what can be more shallow than the pretext of the supposed *embarrassment* !

“ I took occasion to mention, at the close of our conversation the recent appointment of Admiral Berkeley to the Lisbon sta-

tion. Mr. Canning said that, with every inclination to consult the feelings of the American government on that subject, it was impossible for the admiralty to resist the claim of that officer to be employed, *after such a lapse of time since his recall from Halifax*, without bringing him to a court-martial. The usage of the navy was in this respect different from that of the army. He might, however, still be brought to a court-martial—and in what he had done, he had acted wholly without authority, &c. &c. I did not purpose to enter into any discussion upon the subject, and contented myself with lamenting the appointment as unfortunate.

“The documents laid before Congress and published have had a good effect here. Your letter to Mr. Erskine I have caused to be printed in a pamphlet, with my letter to Mr. Canning of the 23d of August, and his reply. The report of the Committee of the House of Representatives is admitted to be a most able paper, and has been published in the Morning Chronicle. The Times newspaper (notwithstanding its former violence against us) agrees that our overture should have been accepted.

“The opposition in parliament is unanimous on this subject, although divided on others. Many of the friends of government speak well of our overture, and almost every body disapproves of Mr. Canning’s note. The tone has changed too, in the city. In short, I have a strong hope that the eminent wisdom of the late American measures will soon be practically proved to the confusion of their opponents.

“I refer you to the newspapers for news (in the highest degree interesting) and for the debates. See particularly Mr. Canning’s speech in the House of Commons, on the 19th, as reported in the Morning Chronicle.

“P. S. As it was possible that the resolutions of the House of Representatives might not pass into a law, I endeavoured to accommodate my conversation of yesterday to that possibility, at the same time that I did not refuse to let Mr. Canning see that I supposed the law would pass.

“I have omitted to mention that we spoke of Mr. Sawyer’s letter in our first conversation, and that during the whole of the evening Mr. Canning seemed desirous of showing, by more than

usual kindness and respect, that it had made no unfavourable impression. I incline to think that it has rather done good than harm.

"I have marked this letter *Private*, because I understood Mr. Cauning as rather speaking confidentially than officially, and I certainly meant so to speak myself; but you will, nevertheless, make use of it as you think fit. Of course it will not in any event be published.

"A third embargo breaker has arrived at Kinsale, in Ireland, on her way to Liverpool. She is called the Sally, and is of Virginia, with more than three hundred hogsheads of tobacco."

Mr. MADISON to Mr. PINKNEY,

Private.

"WASHINGTON, Feb. 11th, 1809.

"DEAR SIR,—My official letter by this conveyance leaves but little to be added to its contents. You will see with regret the difficulty experienced in collecting the mind of Congress to some proper focus. On no occasion were the ideas so unstable and so scattered. The most to be hoped for at present is that a respectable majority will finally concur in taking a course not essentially dishonouring the resolution, not to submit to the foreign edicts. The last vote taken, as stated in reports of their proceedings, 60 odd against 50 odd, implies that a non-intercourse with Great Britain and France, including an embargo on exports to those two nations, will be substituted for the general embargo existing; and it is not improbable that 8 or 10 of the minority who prefer a simple adherence to the latter, will, on finding that it cannot be retained, join in the non-intercourse proposed. It is impossible, however, to foretell the precise issue of such complicated views.

"If the non-intercourse as proposed should be adopted, it will leave open a trade to all the *continent* of Europe, except France. Among the considerations for not including the other powers with France, were, 1st, the certainty that the Russian edict, of which I enclose a copy, does not violate our neutral rights: and 2dly, the uncertainty as to most of the other powers, whether they have in force unlawful edicts or not. Denmark, it is ascer-

tained, though not officially notified, is under the same description as Russia. Holland and Spain are the only two countries which are known to have copied the several decrees of France. With respect to Holland, it is understood that she will favour, as far as she can, an intercourse with neutrals, in preference to a co-operation with France. It would be imitating the cruelty of the belligerents to retaliate the reluctant injuries received from such a quarter. With respect to Spain, the same remark is applicable, even if her decrees should not have been revoked. Besides this, it is particularly important not to extend the non-intercourse to the Spanish colonies, which whilst a part of Spain would be within the effect of the Spanish decrees on the question. It is probable, also, that if Great Britain should lose or withdraw her armies from Spain, she will endeavour to mitigate the odium by permitting at least all neutral supplies; or rather not to increase the odium and the evil by subjecting them to the famine threatened by the exhausted state produced by the war. As another motive, she may be expected to consult the sympathies with the parent nation of the Spanish colonies, to which her attention will doubtless be turned in the event of a subjugation of Spain. As to Portugal, there can be little doubt that the British cabinet will have prudence, if not humanity, enough not to oppose a trade supplying that country with the necessaries of life.

“On what principle is it that Great Britain arrests our trade with Russia, or even Denmark? Neither of those powers have edicts to countenance her retaliations; nor can the former be regarded as under the sway of France in the sense applied to some others. Is it that she prohibits the British flag? But that she has a right to do—England does the same. Is it that she prohibited all trade with England under a neutral flag? That she has an equal right to do, and has equally examples in the British code justifying it. I have been frequently asked whether a trade from the United States to Russia would be captured. I have been obliged to answer that, as it came under the letter of the British orders, though excluded by what was held out as the principle of them, it was to be inferred from the spirit and practice of British cruizers and courts, that such would be the fate of vessels making the experiment.

" The repeal of the embargo has been the result of the opinion of many that the period prescribed by honour for that resort against the tyrannical edicts against our trade had passed by, but principally from the violence exerted against it in the eastern quarter, which some wished to assuage by indulgence, and others to chastise into an American spirit by the lash of British spoliations. I think this effect begins to be anticipated by some who were most clamorous for the repeal. As the embargo is disappearing, the orders and decrees come into view with the commercial and political consequences which they cannot fail to produce. The English market will at once be glutted, and the continental markets, particularly for the sugar and coffee in the eastern warehouses, will be sought at every risk : Hence captures and clamours against the authors of them. It cannot, I think, be doubted that if the embargo be repealed and the orders be enforced, war is inevitable, and will perhaps be clamoured for in the same quarter which now vents its disappointed love of gain against the embargo.

" There is reason to believe that the disorganizing spirit in the east is giving way to the indignation of all parties elsewhere against it. It is repressed in part also by the course of events abroad, which lessens the prospect of British support in case of a civil war."

" P. S. The mode in which Mr. Canning's letter got to the press is not ascertained. I have seen it stated, on what authority I know not, that the copy was obtained from the minister here, and was to have been published in the first instance at Halifax ; but being shown by the bearer to certain British partizans of more zeal than discretion at Boston, he was prevailed on to hand it at once to the *Palladium*, the paper in which it first appeared."

Mr. PINKNEY to Mr. MADISON.

Private.

" LONDON, May 3d, 1809.

" DEAR SIR,—I have had the honour to receive your letter of the 17th of March, and thank you sincerely for your good wishes. Permit me to offer you my cordial congratulations upon

the manner in which you have been called to the Presidency. Such a majority at such a time is most honourable to our country and to you. My trust is that with the progress of your administration your friends will grow in strength and numbers, and that the people will see in your future labours new titles to praise and confidence. You have my cordial wishes for your fame and happiness, and for the success of all your views for the public good.

"The publication of my letter of the 21st of September has not had the effect which malice expected and intended; and it is not improbable that it has contributed to produce a result directly the reverse of its obvious purpose. Such an incident, however, is injurious to the character of our country, but it will doubtless inspire at home such a distrust of the honour of members of Congress, who could condescend to so low and malignant a fraud, as to present a repetition of it.

"My letter to the Secretary of State will announce to you the change which has taken place here on the subject of the orders in council.* I venture to hope that this measure will open the way to reconciliation between this country and America without any disparagement of our interests or our honour. I have not time (as the messenger leaves town in the morning and it is now late at night) to trouble you with a detailed statement of my notions on this subject—but I will presume upon your indulgence for a few words upon it.

"The change does undoubtedly produce a great effect in a commercial view, and removes many of the most disgusting features of that system of violence and monopoly against which our efforts have been justly directed. The orders of November were in execution of a sordid scheme of commercial and fiscal

* [An order in council was issued on the 26th of April, 1809, by which the blockade declared by the previous orders was restricted to the ports of France and Holland as far north as the river Ems, inclusively, to the colonies of both those powers, and to the ports in the north of Italy from Orbitalto and Pesaro inclusively: and the duties on the transit of goods through British ports to those of the European continent, which had been established by the former orders and the Act of Parliament to carry them into effect, were also repealed by an order of December, 1808.]

advantage, to which America was to be sacrificed. They were not more atrocious than mean. The trade of the world was to be forced through British ports and to pay British imposts. As a belligerent instrument the orders were nothing. They were a trick of trade—a huckstering contrivance to enrich Great Britain and drive other nations from the seas. The new system has a better air. Commerce is no longer to be forced through this country. We may go direct to Russia, and to all other countries, except to France and Holland, and the kingdom of Italy and their colonies. The *duty* system is at an end. We may carry as heretofore enemy productions. The provision about certificates of origin is repealed. That about prize ships is repealed also. What remains of the old measure is of a *belligerent* character, and is to be strictly executed as such. No licenses are to be granted even to British merchants to trade to Holland or France.

“ There can be no question that this change gives us all the immediate benefits which could have arisen out of the acceptance of our overture of last year. It does not indeed give us the same claim to demand from France the recall of her edicts; but in every other respect it may be doubted whether it is not more convenient. If that overture had been received, a difficulty would have occurred as to the mode of making it effectual, as mentioned in my private letter of the 23d of January. And if we had agreed, either formally or by mere understanding, to Mr. Canning’s suggestion mentioned in the same letter, the substance of the thing would have approached very nearly to what has since been done. But at any rate the manner of the transaction is open to negotiation, and the intimation to that effect which has been made to me may be an inducement to resume a friendly attitude towards Great Britain, and to put the sincerity of that intimation to the test.

“ For the gain actually obtained we pay no price. We give no pledge of any sort, and are not bound to take any step whatever. The embargo is already repealed after the end of the approaching session of Congress. The non-intercourse law will expire at the same time. If neither should be continued at the approaching session, negotiation may be tried for obtaining what is yet to be

desired, and, that failing, our future measures are in our own power.

“ I am not sure that we have not got rid of the most obnoxious portion of the British Orders *in the most acceptable way*. To what is left, it is impossible that either the government or the people of this country can be much attached. Having obtained gratuitously the present concessions, we are warranted in hoping that the rest, diminished in value, flattering no prejudices, addressing itself to no peculiar interests, and viewed with indifference by all, will be easily abandoned. In the mean time our peace is preserved, and our industry revived. France can have no cause of quarrel with us, nor we any inducement to seek a quarrel with her. The United States are no parties to the recent British measure, as a measure of pressure and coercion upon France. We may trade in consequence of it, and endeavour to obtain farther concessions, without the hazard of war with either party; while what has already been conceded saves our honour and greatly improves our situation. Our overture of last summer, if accepted, must have produced war with France, unless France had retracted her decrees, which was greatly to be doubted. The recent British measure, not being the result of an *arrangement* with America, will not have that tendency. For my own part, I have always believed that a war with France, if it could be avoided, was the idlest thing we could do. We may talk of “ unfurling the Republican banner against France ”—but, when we had unfurled our banner, there would be an end of our exploits. This is precisely such a flourish as might be expected from a heavy intellect wandering from its ordinary track. It is not remembered that if we go to war with France, we shall be shut out from the continent of Europe, without knowing where it would cease to repel us. It is not remembered that in a war with France we might *suffer*, but could not *act*—that we should be an humble ally without hope of honour, and a feeble enemy without a chance of victory. It appears to me that the world would stand amazed if we, a commercial nation, whose interests are incompatible with war, should, *upon the instigation of our passions*, strut into the lists with gigantic France, with a metaphor in our mouths, but with no means of annoyance in our

hands, and professing to be the champions of commerce, do just enough to provoke its destruction and make ourselves ridiculous.

"Our friends in this country are all of opinion that we should take in good part the new order in council, and, suffering our restrictive laws to expire, rely upon friendly negotiation and a change of policy in this government for the further success of our wishes. I can assure you with confidence that they would be greatly disappointed and grieved if we should be found to take any other course. Our triumph is already considered as a signal one by every body. The pretexes with which ministers would conceal their motives for a relinquishment of all which they prized in their system, are seen through; and it is universally viewed as a concession to America. Our honour is now safe, and by management we may probably gain every thing we have in view. A change of ministers is not unlikely, and if a change happens it will be favourable to us. Every thing conspires to recommend moderation.

"I need not, I am sure, make any apology for myself, even although you should think that less has been obtained here than ought to have been obtained. I have endeavoured to do the best with the means put at my disposal, and I have avoided committing my government. I am persuaded that all that was practicable has been accomplished, and I have a strong confidence that used and followed up as your wisdom and that of the legislature will direct, the result will be good."

Mr. PINKNEY to Mr. MADISON.

Private.

"LONDON, Aug. 19th, 1809.

"DEAR SIR,—I have had the honour to receive your kind letter of the 21st of April; and now send the last edition of *War in Disguise* as you request.

"American newspapers have been received here, showing that the disavowal of Mr. Erskine's arrangement has excited much

[* One of the first acts of Mr. Madison's administration had been to conclude an arrangement with the British minister at Washington, Mr. Erskine, by which the orders in council were to be repealed, and satisfaction was to be given for the attack on the frigate *Chester*, and the trade between the

ferment in the United States.* I cannot subdue my first regret that it was found to be necessary at the last regular session of Congress to falter in the course we were pursuing, and to give signs of inability to persevere in a system which was on the point of accomplishing all its purposes. That it *was* found to be necessary I have no doubt; but I have great doubts whether, if it had fortunately been otherwise, we should have had any *disavowals*. It is to be hoped, however, that every thing will yet turn out well. That *you* will do all that can be done at this perilous moment for the honour and advantage of our country, I am sure. I congratulate you heartily on the abundant proofs of general confidence which have marked the commencement of your administration. I venture to prophesy that they will multiply as you advance, and that in the maturity of your administration, it will be identified in the opinions of all men with the strength, and character, and prosperity of the State."

* * * * *

"I shall be greatly deceived if France relaxes at this time from her decrees against neutral rights. I should rather have expected additional rigour, if General Armstrong had not given me reason to expect better things. The maritime *arrondissement* now so near its completion will furnish new inducements to perseverance in the anti-commercial system."

{The recall of Mr. Erskine, in consequence of the refusal of the British government to ratify the arrangement entered into by him, was followed by the mission of Mr. Jackson as special envoy to the government of the United States. There was a general expectation in this country that he would be charged with conciliatory explanations of the disavowal of his predecessor, and with proposals to be substituted for the rejected arrangement. But this expectation was disappointed. It was found that the new minister had received no authority to enter into explana-

United States and Great Britain was to be renewed. This arrangement was no sooner known in England, than it was disavowed by the British government, as not having been made conformably to the instructions sent to its minister to this country.)

tions relative to the rejection of the arrangement, or to substitute any proposal for that part of it which regarded the British orders in council. His proposals respecting the attack on the frigate Chesapeake were founded upon what the United States had repeatedly declared to be an inadmissible basis, that the first step towards an adjustment should proceed from them by a revocation of the President's proclamation interdicting British armed vessels from entering their waters. In the course of his correspondence with the Secretary of State, Mr. Jackson repeatedly imputed to the government of the United States a knowledge of the fact that the arrangement concluded by Mr. Erskine was not authorized by his instructions. In consequence of this offensive conduct, our government refused to receive any further communications from him, and Mr. Pinkney was instructed to explain the necessity of this step to the British court. At the date of the following letter, it would seem that he had only seen the first part of Mr. Jackson's correspondence, but had not then received its sequel and his instructions to explain to the British government the necessity of refusing to receive any further communications from him.]

Mr. PINKNEY to Mr. MADISON.

Private.

" LONDON, Dec. 10th, 1809.

" DEAR SIR,—I see with great pleasure the ground taken by the Secretary of State in his correspondence with Mr. Jackson, connected with the probability that our people are recovering from recent delusion, and will hereafter be disposed to support with zeal and *steadiness* the efforts of their government to maintain their honour and character. Jackson's course is an extraordinary one, and his *manner* is little better.

" The British government has acted for some time upon an opinion that its partizans in America were too numerous and strong to admit of our persevering in any system of repulsion to British injustice ; and it cannot be denied that appearances countenanced this humiliating and pernicious opinion ; which has been entertained by our friends. My own confidence in the American people was great ; but it was shaken nevertheless. I

am re-assured, however, by present symptoms, and give myself up once more to hope. The prospect of returning virtue is cheering ; and I trust it is not in danger of being obscured and deformed by the recurrence of those detestable scenes which lately reduced our patriotism to a problem.

“ The *new* ministry (if the late changes entitle it to be so called) is at least as likely as the last to presume upon our divisions. I have heard it said that it was impossible to form a cabinet more unfriendly to us, more effectually steeped and dyed in all those bad principles which have harassed and insulted us. I continue to believe that, as it is now constituted, or even with any modifications of which it is susceptible, it cannot last ; and that it will not choose to hazard much in maintaining against the United States the late maritime innovations.

“ The people of England are rather better disposed than heretofore to accommodate with us. They seem to have awaked from the flattering dreams by which their understandings have been so long abused. Disappointment and disaster have dissipated the brilliant expectations of undefined prosperity which had dazzled them into moral blindness, and had cheated them of their discretion as well as of their sense of justice. In this state of things America naturally resumes her importance, and her rights become again intelligible. Lost as we were to the view of Englishmen during an overpowering blaze of imaginary glory and commercial grandeur, we are once more visible in the sober light to which facts have tempered and reduced the glare of fiction. The use of this opportunity depends upon ourselves, and doubtless we shall use it as we ought.

It is, after all, perhaps to be doubted whether any thing but a general peace (which, if we may judge from the past, it is not unlikely France will soon propose) can remove all dilemma from our situation. More wisdom and virtue than it would be quite reasonable to expect, must be found in the councils of the two great belligerent parties, before the war in which they are now engaged can become harmless to our rights. Even if England should recall (and I am convinced she could have been, and yet can be, compelled to recall) her foolish orders in council, her maritime pretensions will still be exuberant, and many of her

practices most oppressive. From France we have only to look for what hostility to England may suggest. Justice and enlightened policy are out of the question on both sides. Upon France, I fear, we have no means of acting with effect. Her ruler sets our ordinary means at defiance. We cannot alarm him for his colonies, his trade, his manufactures, his revenue. He would not probably be moved by our attempts to do so, even if they were directed exclusively against himself. He is less likely to be so moved while they comprehend his enemy. A war with France, I shall always contend, would not help our case. It would aggravate our embarrassments in all respects. Our interests would be struck to the heart by it. For our honour it could do nothing. The territory of this mighty power is absolutely invulnerable; and there is no mode in which we could make her feel either physical or moral coercion. We might as well declare war against the inhabitants of the Moon or of the *Georgian Sidus*. When we had produced the entire exclusion of our trade from the whole of continental Europe, and increased its hazards every where, what else could we hope to achieve by gallantry, or win by stratagem? Great Britain would go smuggling on as usual; but we could neither fight nor smuggle. We should tire of so absurd a contest long before it would end, (who shall say when it would end?) and we should come out of it, after wondering how we got into it, with our manufactures annihilated by British competition, our commerce crippled by an enemy and smothered by a friend, our spirit debased into listlessness, and our character deeply injured. I beg your pardon for recurring to this topic, upon which I will not fatigue you with another word, lest I should persecute you with many.

“ The ministry are certainly endeavouring to gain strength by some changes. It is said that Lord Wellesley is trying to bring Mr. Canning back to the cabinet; and, if so, I see no reason why he should not succeed. One statement is that Mr. Canning is to go to the Admiralty—another, that he is to return to the Foreign Department, that Lord Wellesley is to take the Treasury, and Mr. Percival to relapse into a mere Chancellor of the Exchequer. It is added that Lord Camden (President of the Council) and Lord Westmoreland (Privy Seal) are to go out.

"If Mr. Canning should not join his old colleagues before the meeting of Parliament, he will probably soon fall into the ranks of opposition, where he will be formidable. There will scarcely be any scruple in receiving him. If he should join his old colleagues, they will not gain much by him. As a debater in the House of Commons, he would be useful to them;* but his reputation is not at this moment in the best possible plight, and his weight and connections are almost nothing. I am not sure that they would not lose by him more than they could gain.

If Lord Grenville and Lord Grey should be recalled to power, Lord Holland would be likely to have the station of Foreign Secretary (Lord Grey preferring, as it is said, the Admiralty.)

I believe that I have not mentioned to you that Mr. G. H. Roae was to have been the special envoy to our country, if Mr. Erskine's arrangement had not been disavowed. I am bound to say that a worse choice could not have been made. - Since his return to England, he has, I know, misrepresented and traduced us with an industry that is absolutely astonishing, notwithstanding the cant of friendship and respect with which he overwhelms the few Americans who see him.

Mr. MADISON to Mr. PINKNEY.

"WASHINGTON, Jan. 20th, 1810.

"DEAR SIR,—I received, some days ago, a letter from Dr. Logan, containing observations on the posture and prospects of our foreign relations. Before the answer was out of my hands, I received another, dated four days after, in which he merely informed me that he should embark for England in about eight days, with an offer to take charge of any communications for you. As his first letter did not glance at any such intention, it must be presumed to have been very suddenly formed. And as his last is silent as to the object of the trip, this is left to conjecture. From the anxiety expressed in his first letter for the preservation of

* The only cabinet ministers at present in the House of Commons, are Mr Percival, and Mr. Ryder, (the Secretary of State for the Home Department, and brother of Lord Harrowby.) The latter gentleman excites no expectations.

peace with England, which appeared to him to be in peculiar danger, and from his known benevolence and zeal on the subject, it may reasonably be supposed that his views relate, in some form or other, to a mitigation of the hostile tendencies which distress him ; and that his silence may proceed from a wish to give no handle for animadversions of any sort on the step taken by him.

“ You will receive from the Secretary of State, unless, indeed, the opportunity fail through the shortness of the notice, such communications and observations as may be thought useful to you. You will find that the perplexity of our situation is amply displayed by the diversity of opinions and prolixity of discussions in Congress. Few are desirous of war ; and few are reconciled to submission ; yet the frustration of intermediate courses seems to have left scarce any escape from that dilemma. The fate of Mr. Macon’s bill, as it is called, is not certain. It will probably pass the House of Representatives, and for aught I know, may be concurred in by the Senate. If retaliated by Great Britain, it will operate as a non-importation act, and throw exports into the circuit of the non-intercourse act : If not retaliated, it may be felt by the British navigation, and through that interest, by the government : since the execution of the law, which relates to the ship, and not to the merchandise, cannot be evaded. With respect to the East Indies, the proposed regulation will have the effect of compelling the admission of a direct and exclusive trade for our vessels, or a relinquishment of this market for India goods, further than they can be smuggled into it. It just appears that a proposition has been made in the House of Representatives, to employ our ships of war in convoys, and to permit merchantmen to arm. However plausible the arguments for this experiment, its tendency to hostile collisions is so evident, that I think its success improbable. As a mode of going into war, it does not seem likely to be generally approved, if war was the object. The military preparations which have been recommended and are under consideration, are what they profess to be, measures of precaution. They are not only justified but dictated by the uncertainty attending the course which Great Britain may take, or rather by the unyielding and unamicable traits in her cabinet and

her countenance. Measures of that sort are also the more adapted to our situation, as in the event of accommodation with Great Britain they may possibly be wanted in another quarter. The long debates on the resolution of Mr. Giles, on the subject of Mr. Jackson, have terminated in affirmative votes by large majorities. This, with the refusal of the Executive to hold communications with him, it is supposed, will produce a crisis in the British policy towards the United States, to which the representations of the angry minister will doubtless be calculated to give an unfavourable turn. Should this happen, our precautionary views will have been the more seasonable. It is most probable, however, that instead of expressing resentment by open war, it will appear in more extended depredations on our commerce, in declining to replace Mr. Jackson, and perhaps in the course, observed with respect to you, in meeting which your own judgment will be the best guide. Should a change in the composition or calculations of the cabinet give a favourable turn to its policy towards this country, it is desirable that no time may be lost in allowing it its effect. With this view you will be reminded of the *several* authorities you retain to meet in negotiation, and of the instructions by which they are to be exercised: it being always understood that, with the exception of some arrangement touching the Orders in Council, reparation for the insult on the Chesapeake must precede a general negotiation on the questions between the two countries. At present nothing precise can be said as to a condition on our part for a repeal of the Orders in Council; the existing authority in the Executive to pledge one, being expirable with the Non-Intercourse act, and no other pledge being provided for. As it is our anxious desire, however, if the British government should adopt just and conciliatory views, that nothing may be omitted that can show our readiness to second them, you may offer a general assurance that, as in the case of the Embargo, and the Non-Intercourse acts, any similar power with which the Executive may be clothed, will be exercised in the same spirit

“ You will, doubtless, be somewhat surprised to find among the communications to Congress, and in print too, the confidential conversations with Mr. Canning reserved from such a use by your own request. It was, in fact, impossible to resist the

pointed call for them, without giving umbrage to some, and opportunity for injurious inferences to others. The difficulty was increased by the connexion between them and other communications necessarily falling within the scope of the rule of compliance in such cases. Finally, there did not appear to be any thing in the conversations which could warrant British complaint of their disclosure, or widen the space between you and the British ministry.

“As it may not be amiss that you should know the sentiments which I had expressed to Dr. Logan, and which, though in answer to his letter written previous to the notification of his intended trip, he will, of course, carry with him, I enclose a copy of the answer.

“The file of newspapers from the Department of State, will give you the debates on the case of Jackson. I enclose, however, a speech I have just looked over in a pamphlet form. Although liable to very obvious criticisms of several sorts, it has presented a better analysis of some parts of the subject, than I have observed in any of the speeches.”

Mr. PINKNEY to Mr. MADISON.

“LONDON, 23d March, 1810.

“DEAR SIR,—I had intended to write to you a very tedious letter, but I have no longer time to do so—as it is now near 2 o’clock in the morning, and Lieut. Elliott leaves town at 10, A. M.

“My official letter of the 21st inst. will apprize you of the course finally taken by this government in consequence of Mr. Jackson’s affair. I do not pretend to anticipate your judgment upon it. It certainly is not what I wished, and, at one time, expected; but I am persuaded that it is meant to be conciliatory. I have laboured earnestly to produce such a result as I believed would be more acceptable. Why I have failed I do not precisely know, and I will not harass you with conjectures. The result, such as it is, will I am sure be used in the wisest manner for the honour and prosperity of our country.

“It is doubtful whether there will be any change of administration here. Partial changes in administration are very likely.

" I think I can say with certainty that a more friendly disposition towards the United States exists in this country at present than for a long time past."

* * * * *

Mr. MADISON to Mr. PINKNEY.

" WASHINGTON, May 23d, 1810.

DEAR SIR,—You will learn from the Department of State, as you must have anticipated, our surprize that the answer of Lord Wellesley to your very just and able view of the case of Jackson, corresponded so little with the impressions of that minister manifested in your first interviews with him. The date of the answer explains the change, as it shows that time was taken for obtaining intelligence from this country, and adapting the policy of the answer to the position taken by the advocates of Jackson. And it must have happened that the intelligence prevailing at that date was of the sort most likely to mislead. The elections which have since taken place in the eastern states, and which have been materially influenced by the affair of Jackson and the spirit of party connected with it, are the strongest of proofs that the measure of the executive coincided with the feelings of the nation. In every point of view the answer is unworthy of the source from which it comes.

" From the manner in which the vacancy left by Jackson is provided for, it is inferred that a sacrifice is meant of the respect belonging to this government, either to the pride of the British government, or to the feelings of those who have taken side with it against their own. On either supposition, it is necessary to counteract the ignoble purpose. You will accordingly find that on ascertaining the substitution of a charge to be an intentional degradation of the diplomatic intercourse on the part of Great Britain, it is deemed proper that no higher functionary should represent the United States at London. I sincerely wish, on every account, that the views of the British government in this instance, may not be such as are denoted by appearances, or that, on finding the tendency of them, they may be changed. However the fact may turn out, you will of course not lose sight of the expe-

diency of mingling in every step you take, as much of moderation, and even of conciliation, as can be justifiable, and will, in particular, if the present despatches should find you in actual negotiation, be governed by the result of it, in determining the question of your devolving your trust on a Secretary of Legation.

“ The act of Congress, transmitted from the Department of State, will inform you of the footing on which our relations to the belligerent powers were finally placed. The experiment now to be made of a commerce with both, unrestricted by our laws, has resulted from causes which you will collect from the debates, and from your own reflections. The new form of appeal to the policy of Great Britain and France, on the subject of the decrees and orders, will most engage your attention. However feeble it may appear, it is possible that one or the other of those powers may allow it more effect than was produced by the overtures heretofore tried. As far as pride may have influenced the reception of these, it will be the less in the way, as the law in its present form may be regarded by each of the parties, if it so pleases, not as a coercion or a threat to itself, but as a promise of attack on the other. Great Britain indeed may conceive that she has now a complete interest in perpetuating the actual state of things, which gives her the full enjoyment of our trade, and enables her to cut it off with every other part of the world, at the same time that it increases the chance of such resentments in France at the inequality as may lead to hostilities with the United States. But, on the other hand, this very inequality, which France would confirm by a state of hostilities with the United States, may become a motive with her to turn the tables on Great Britain, by compelling her either to revoke her orders, or to lose the commerce of this country! An apprehension that France may take this politic course, would be a rational motive with the British government to get the start of her. Nor is this the only apprehension that merits attention. Among the inducements to the experiment of an unrestricted commerce now made were two, which contributed essentially to the majority of votes in its favour; first, a general hope, favoured by daily accounts from England, that an adjustment of differences there, and thence in France, would ren-

der the measure safe and proper ; second, a willingness in not a few to teach the advocates for an open trade under actual circumstances, the folly, as well as degradation of their policy. At the next meeting of Congress, it will be found, according to present appearances, that instead of an adjustment with either of the belligerents, there is an increased obstinacy in both, and that the inconveniences of the embargo and non-intercourse have been exchanged for the greater sacrifices as well as disgrace resulting from a submission to the predatory systems in force. It will not be wonderful therefore if the passive spirit which marked the late session of Congress, should at the next meeting be roused to the opposite point ; more especially as the tone of the nation has never been as low as that of its representatives, and as it is rising already under the losses sustained by our commerce in the continental ports, and by the fall of prices in our produce at home, under a limitation of the market to Great Britain. Cotton I perceive is down at 10 or 11 cents in Georgia. The great mass of tobacco is in a similar situation : and the effect must soon be general, with the exception of a few articles which do not at present glut the British demand. Whether considerations like these will make any favourable impression on the British cabinet, you will be the first to know. Whatever confidence I may have in them, I must forget all that is past before I can indulge very favourable expectations. Every new occasion seems to countenance the belief that there lurks in the British cabinet a hostile feeling towards this country, which will never be eradicated during the present reign ; nor overruled, whilst it exists, but by some dreadful pressure from external or internal causes.

“ With respect to the French government, we are taught by experience to be equally distrustful. It will have, however, the same opportunity presented to it with the British government, of comparing the actual state of things with that which would be produced by a repeal of its decrees ; and it is not easy to find any plausible motive to continue the former as preferable to the latter. A worse state of things than the actual one could not exist for France, unless her preference be for a state of war. If she be sincere, either in her late propositions for a chronological revocation of illegal edicts against neutrals, or to a pledge

from the United States not to submit to those of Great Britain, she ought at once to embrace the arrangement held out by Congress ; the renewal of a non-intercourse with Great Britain, being the very species of resistance most analogous to her professed views.

" I propose to commit this to the care of Mr. Parish, who is about embarking at Philadelphia for England, and finding that I have missed a day in my computation of the opportunity, I must abruptly conclude with assurances of my great esteem and friendly respect."

Mr. PINKNEY to Mr. MADISON.

Private.

" LONDON, August 13, 1810.

" DEAR SIR,—I return you my sincere thanks for your letter of the 23d of May. Nothing could have been more acceptable than the approbation which you are so good as to express of my note to Lord Wellesley on Jackson's affairs. I wish I had been more successful in my endeavours to obtain an unexceptionable answer to it. You need not be told that the actual reply was, to plan and terms, wide of the expectations which I had formed of it. It was unfortunately delayed until first views and feelings became weak of themselves. The support which Jackson received in America was admirably calculated to produce other views and feelings, not only by its direct influence on Lord Wellesley and his colleagues, but by the influence which they could not but know it had on the British nation and the Parliament. The extravagant conduct of France had the same pernicious tendency ; and the appearances in Congress, with reference to our future attitude on the subject of the atrocious wrongs inflicted upon us by France and England, could scarcely be without their effect. It is not to be doubted that, with a strong desire in the outset to act a very conciliatory part, the British government was thus gradually prepared to introduce into the proceeding what would not otherwise have found a place in it, and to omit what it ought to have contained. The subject appeared to it every day in a new light, shed upon it from France and the United States, and a corresponding change naturally enough took

place in the scarcely remembered estimates which had at first been made of the proper mode of managing it. The change in Lord Wellesley's notion upon it, between our first interview and the date of his answer to my note, must have been considerable, if that answer had, as doubtless it had, his approbation. For, the account of that interview, as given in my private letter to Mr. Smith of the 4th of January, is so far from exaggerating Lord Wellesley's reception of what I said to him, that it is much below it. It is to be observed, however, that he had hardly read the correspondence, and had evidently thought very little upon it. For which reason, and because he spoke for himself only, and with less care than he would perhaps have used if he had considered that he was speaking officially, I am glad that you declined laying my private letter before the Congress. The publication of it, which must necessarily have followed, would have produced serious embarrassment.

"Do you not think that, in some respects, Lord Wellesley's answer to my note has not been exactly appreciated in America? I confess to you that this is my opinion.—That the paper is a very bad one is perfectly clear; but it is not so bad in intention as it is in reality, nor quite so bad in reality as it is commonly supposed to be.

"It is the production of an indolent man, making a great *effort* to reconcile things *almost* incongruous, and just showing his wish without executing it. Lord Wellesley wished to be extremely civil to the American government; but he was at the same time to be very stately—to manage Jackson's situation—and to intimate disapprobation of the suspension of his functions. He was stately, not so much from design, as because he cannot be otherwise. In managing Jackson's situation he must have gone beyond his original intention, and certainly beyond any, of which I was aware before I received his answer. If the answer had been promptly written, I have no belief that he would have affected to praise Jackson's "ability, zeal, and integrity," or that he would have said any thing about his Majesty not having "marked his conduct with any expression of his displeasure." He would have been content to forbear to censure him; and *that* I always took for granted he would do.

"For Jackson, personally, Lord Wellesley cares nothing. In his several conferences with me, he never vindicated him, and he certainly did not mean in his letter to undertake his defence. It is impossible that he should not have (*I am indeed sure that he has*) a mean opinion of that most clumsy and ill-conditioned minister. His idea always appeared to be that he was wrong in pressing at all the topic which gave offence; but that he acted upon good motives, and that his government could not with honour, or without injury to the diplomatic service generally, *disgrace him*. This is explicitly stated in my private letter of the 4th of January to Mr. Smith. There is a great difference, undoubtedly, between that idea, and the one upon which Lord Wellesley appears finally to have acted. It must be admitted, however, that the praise bestowed upon Jackson is very meagre, and that it ascribes to him no qualities in any degree inconsistent with the charge of gross indecency and intolerable petulance preferred against him in my note. He might be honest, zealous, able; and yet be indiscreet, ill-tempered, suspicious, arrogant, and ill-mannered. It is to be observed, too, this has no reference whatever to the actual case, and that, when the answer speaks of the offence imputed to Jackson by the American government, it does not say that he gave no such cause of offence, but simply relies on his repeated asseverations that he *did not mean to offend*.

"If the answer had been promptly written, I am persuaded that another feature which now distinguishes it would have been otherwise. It would not have contained any complaint against the course adopted by the American government in putting an end to official communication with Jackson. That Lord Wellesley thought that course objectionable from the first appears in my private letter above mentioned to Mr. Smith. But he did not urge his objections to it in such a way, at our first interview or afterwards, as to induce me to suppose that he would except to that course in his written answer. He said in the outset that he considered it a *damnum* to the British government; and I know that he was not disposed to acknowledge the regularity of it. There was evidently no necessity, if he did not approve the course, to say any thing about it—and in our conversations I always *assumed* that it was not only unnecessary but wholly inad-

missible to mention it officially for any other purpose than that of approving it.

“ After all, however, what he has said upon this point (idle and ill-judged as it is) is the mere statement of the opinion of the British government, that another course would have been more in rule than ours. It amounts to this, then, that we have opinion against opinion and practice ; and that our practice has been acquiesced in.

“ As to that part of the answer which speaks of a *chargé d'affaires*, it must now be repented of here, especially by Lord Wellesley, if it was really intended as a threat of future inequality in the diplomatic establishments of the two countries, or even to wear that appearance. Lord Wellesley's letter to me of the 22d ult. abandons that threat, and makes it consequently much worse than nothing. His explanations to me on that head (*not official*) have lately been, that, when he wrote his answer, he thought there was some person in America to whom Jackson could have immediately delivered his charge, and that if he had not been under that impression, he should not probably have spoken in his answer of a *chargé d'affaires*, and should have sent out a minister plenipotentiary in the first instance. I know not what stress ought to be laid upon those private and *ex post facto* suggestions ; but I am entirely convinced that there was no thought of continuing a *chargé d'affaires* at Washington for more than a short time. Neither their pride, nor their interests, nor the scantiness of their present diplomatic patronage would permit it. That Lord Wellesley has long been looking out in *his dilatory way* for a suitable character (a man of *rank*) to send as Minister Plenipotentiary to the United States, I have the best reason to be assured. That the appointment has not yet taken place, is no proof at all that it has not been intended. Those who think they understand Lord W. best represent him as *disinclined to business*—and it is certain that I have found him upon every occasion given to procrastination beyond all example. The business of the Chesapeake is a striking instance. Nothing could be fairer than his various conversations on that case. He settles it with me verbally over and over again. He promises his written overture in a few days—and I hear no more

of the matter. There may be cunning in all this, but it is not such cunning as I should expect from Lord Wellesley.

"In the affair of the blockades, it is evident that the delay arises from the cabinet, alarmed at every thing which touches the subject of blockades, and that abominable scheme of monopoly, called the Orders in Council. Yet it is an unquestionable fact that they have suffered, and are suffering severely under the iniquitous restrictions which they and France have imposed upon the world.

"I mean to wait a little longer for Lord Wellesley's reply to my note of the 30th of April. If it is not soon received, I hope I shall not be thought indiscreet if I present a strong remonstrance upon it, and if I take occasion in it to advert to the affair of the Chesapeake, and to expose what has occurred in that affair between Lord Wellesley and me.

"I have a letter from General Armstrong of the 24th of last month. He expects no change in the measures of the French government with regard to the United States. I cannot, however, refrain from hoping that we shall have no war with that government. We have a sufficient cause for war against both France and England—an equal cause against both in point of justice, even if we take into the account the recent violences of the former. But looking to *expediency*, which should never be lost sight of, I am not aware of any considerations that should induce us in actual circumstances to embark in a war with France. I have so often troubled you on this topic, that I will not venture to stir it again."

* * * * *

Mr. PINKNEY to Mr. MADISON.

"LONDON, Oct. 30th, 1810.

* * * * *

"I have heard nothing further of the appointment of a Plenipotentiary to the United States. Nothing further of the case of the Chesapeake. Lord Wellesley is a surprising man."

*Mr. MADISON to Mr. PINKNEY.**" WASHINGTON, Oct. 30, 1810.*

" DEAR SIR,—Your letter of August 13th was duly received. Its observations on the letter and conduct of Lord Wellesley are an interesting comment on both. The light in which the letter was seen by many in this country was doubtless such as gave to its features an exaggerated deformity. But it was the natural effect of its contrast to the general expectation founded on the tenour of your private letter to Mr. Smith, and on the circumstances which in the case of Jackson seemed to preclude the least delay in repairing the insults committed by him. It is true also that the letter, when viewed in its most favourable light, is an unworthy attempt to spare a false pride on one side at the expense of just feelings on the other, and is in every respect infinitely below the elevation of character assumed by the British government, and even of that ascribed to Lord Wellesley. It betrays the consciousness of a debt with a wish to discharge it in false coin. Had the letter been of an earlier date, and accompanied by the prompt appointment of a successor to Jackson, its aspect would have been much softened. But every thing was rendered as offensive as possible by evasions and delays, which admit no explanation without supposing a double game, by which they were to cheat us into a reliance upon fair promises, whilst they were playing into the hands of their partizans here, who were turning the delays into a triumph over their own government. This consideration had its weight on the decision last communicated, with respect to your continuance at London, or return to the United States.

* * * * *

" The sole question on which your return depends, therefore, is whether the conduct of the government where you are, may not render your longer stay incompatible with the honour of the United States. The last letter of the Secretary of State has so placed the subject for your determination, in which the fullest confidence is felt. Waiving other depending subjects, not of recent date, a review of the course pursued in relation to Jackson

and a successor excites a mixture of indignation and contempt, which ought not to be more lightly expressed than by your *immediately* substituting a secretary of legation for the grade you hold, unless the step be absolutely forbidden by the weighty consideration which has been stated to you, and which coincides with the sound policy to which you allude of putting an adversary completely in the wrong. The prevailing opinion here is that this has already been abundantly done.

“ Besides the public irritation produced by the persevering insolence of Jackson in his long stay, and his conduct during it, there has been a constant heart-burning on the subject of the Chesapeake, and a deep and settled indignation on the score of impressments, which can never be extinguished without a liberal atonement for the former, and a systematic amendment of the latter.

“ You have been already informed that a proclamation would issue giving effect to the late act of Congress on the ground of the Duke de Cadore's letter to General Armstrong, which states an *actual* repeal of the French decrees. The letter of Wellesley to you is a promise only, and that in a very questionable shape; the more so, as Great Britain is known to have founded her retaliatory pretensions on the *unprecedented mode* of warfare against her, evidently meaning the exclusion of her trade from the continent. Even the blockade of May, 1806, rests on the same foundation. These considerations, with the obnoxious exercise of her sham blockades in the moment of our call for their repeal, backed by the example of France, discourage the hope that she contemplates a reconciliation with us. I sincerely wish your next communications may furnish evidence of a more favourable disposition.

“ It will not escape your notice, and is not undeserving that of the British government, that the non-intercourse, as now to be revived, will have the effect of giving a monopoly of our exportations to Great Britain to our own vessels, in *exclusion* of hers; whereas, in its old form, Great Britain obtained a substantial monopoly of hers through the entrepôts of Nova Scotia, East Florida, &c. She cannot therefore deprive our vessels, which may now carry our exports directly to Great Britain, of this

monopoly without refusing the exports altogether, or forcing them into difficult and expensive circuits with the prospect of a counteracting interposition of Congress, should the latter experiment be resorted to. Nothing would be necessary to defeat this experiment but to prohibit, as was heretofore contemplated, the export of our productions to the neighbouring ports belonging to Great Britain or her friends.

“ The course adopted here towards West Florida will be made known by the Secretary of State. The occupancy of the territory as far as the Perdido, was called for by the crisis there, and is understood to be within the authority of the Executive. East Florida also is of great importance to the United States, and it is not probable that Congress will let it pass into any new hands. It is to be hoped that Great Britain will not entangle herself with us by seizing it, either with or without the privity of her allies in Cadiz. The position of Cuba gives the United States so deep an interest in the destiny even of that island, that although they might be inactive, they could not be satisfied spectators at its falling under any European government which may make a fulcrum of that position against the commerce and security of the United States. With respect to Spanish America generally, you will find that Great Britain is engaged in the most eager, and if without the concurrence of the Spanish authorities at Cadiz, the most reproachful grasp of political influence and commercial preference. In turning a provident attention to the new world, as she loses ground in the old, her wisdom is to be commended, if regulated by justice and good faith; nor is her pursuit of commercial preferences, if not seconded by insidious and slanderous means against our competitions, such as are said to be employed, to be tested by any other standard than her own interest. A sound judgment of this does not seem to have been consulted in the specimen given in the treaty at Caracas, by which a preference in trade over all other nations is extorted from the temporary fears and necessities of the revolutionary Spaniards. The policy of the French government at the epoch of our independence, in renouncing every stipulation against the equal privileges of all other nations in our trade, was dictated by a much better knowledge of human nature, and of the stable interest of France.

"The elections for Congress are nearly over. The result is another warning against a reliance on the strength of a British party, if the British government be still under a delusion on that subject. Should France effectually adhere to the ground of a just and conciliatory policy, and Great Britain bring the United States to issue on her paper blockades, so strong is this ground in right and opinion here, and even in the commitment of all the great leaders of her party here, that Great Britain will scarce have an advocate left."

Mr. PINKNEY to Mr. MADISON.

"LONDON, Dec. 17th, 1810.

"DEAR SIR,—The proclamation of the 2d of November* is doing good here, and may, perhaps, bring the ministry to reason. I enclose Cobbet's last number, which touches upon our relations with this country, and Bell's Weekly Messenger of yesterday, which treats of the same subject. My letter to Lord W. of the 10th instant, would have gone into it more fully, (though I was straightened for time,) but that I was afraid of the sin of prolixity, and expected, moreover, to be called upon to resume the discussion in another letter. There is reason to think that, though the freedom of its style may have given umbrage to some of the cabinet, it will assist your proclamation. I have never met with a state-paper to be compared with Lord W.'s note to me of the 4th instant. To tell me gravely and dryly, after my letters of the 25th of August and 3d of November, that he had not been able to obtain any "authentic intelligence" of the repeal of the French edicts, &c.!!

"You may, perhaps, suppose that in my letter to him of the 10th, I have examined too much at large the British construction of the French declaration. I should not have done so but for a conversation a few days before with Sir William Scott, who appeared to have a prodigious hankering after the nonsense about *préalable* conditions. It is known besides to have been the favour-

* [Issued in consequence of the supposed repeal of the French decrees, and declaring the revival of the non-intercourse with Great Britain, unless that power should also repeal its Orders in Council]

ite doctrine of the court and its adherents, and of all that anti-neutral class to which Stephen and Marryatt belong, and indeed of the people in general. We shall probably hear no more of it, however ; and I understood, indeed, last night, that there is a perceptible change in the tone of ministers and their friends on the whole subject. Whether they will act wisely in the end, I cannot yet say. The presumption is always against them.

“ I have observed in my letter that the convenience of relaxing the orders in council by licenses “ seems to be no longer enjoyed.” The object of all that part of my letter was merely to give a slight sketch (which I should have been glad to be at liberty to make much stronger) of that monopolizing and smuggling scheme which has so long insulted the world and tried our patience. The fact is, that they have not granted any licenses for several weeks. It is not, however, (as I am assured,) that they are ashamed of this mean practice, but because they hope, by abstaining from it for a time, to get better terms of intercourse in this way from their enemy. If their orders should not be immediately revoked, so as to prevent the revival of this trick of trade, a vigorous tone should be used with them—and I shall be happy to be authorised to use it at discretion. Be assured they will not stand against a show of determined resistance to their injustice. But if they should, they must be resisted to the uttermost, nevertheless.

“ There will, I am inclined to think, be a regency ; but it is believed that the Prince will be greatly restricted at first. The restrictions will not last ; yet if he should be obliged to continue the present ministers for any time, however short, (which it is imagined will be a part of the terms with which he will be shackled,) the mischiefs of their crooked and little policy towards the United States, supposing that they mean to brave the consequences of persevering in it, may become permanent and irretrievable.

“ There has been, I believe, some juggling in the affair of a Minister Plenipotentiary. You will see in my letter to Mr. Smith of the 14th, an account of Lord W.’s late explanations to me on that head. I have omitted, however, to state in that letter that he *inadvertently* remarked, in the course of the confer-

ence, that great pains had been taken by some people to persuade him "that the *British interest in America* (I quote his words) would be completely destroyed by sending thither at this time a Minister Plenipotentiary." He soon perceived, by my comments on this suggestion, that he had committed an indiscretion in talking of it, and he wished me, I thought, to consider what he had said as confidential. May we not infer that these persuasions have had an effect, when we look to the quality of his ostensible reasons for not redeeming his pledge of July last? Who the *persuaders* were he did not say—but Mr. Jackson (who, by the bye, cannot be very well satisfied with his reception here) may be supposed to be among the number, if he is not the only one. Whether this gentleman (if he *has* used such instances) quotes any *American authorities* in support of them can only be guessed. It would be no breach of charity to conjecture that he does. At any rate there must be some secret cause for the delay of the promised mission. Even the insolence of ————, added to the reason *assigned in conference*, will not explain it satisfactorily. There is cunning at the bottom; and I can imagine nothing so likely to throw a light upon it as the unguarded communication of Lord W. above mentioned.

N^o. IV.

SPEECH IN THE CASE OF THE NEREIDE.

IF I were about to address this high tribunal with a view to establish a reputation as an advocate, I should feel no ordinary degree of resentment against the gentleman whom I am compelled to follow;* if indeed it were possible to feel resentment against one who never fails to plant a strong and durable friendship in the hearts of all who know him. He has dealt with this great cause in a way so masterly, and has presented it before you with such a provoking fulness of illustration, that his unlucky colleague can scarcely set his foot upon a single spot of it without trespassing on some one of those arguments which, with an admirable profusion, I had almost said prodigality of learning, he has spread over the whole subject. Time, however, which changes all things, and man more than any thing, no longer permits me to speak upon the impulse of ambition. It has left me only that of duty; better, perhaps, than the feverish impulse which it has supplanted; suffi-

* Mr. Dallas.

cient, as I hope, to urge me, upon this and every other occasion, to maintain the cause of truth, by such exertions as may become a servant of the law in a forum like this. I shall be content, therefore, to travel after my learned friend, over a part of the track which he has at once smoothed and illuminated happy, rather than displeased, that he has facilitated and justified the celerity with which I mean to traverse it—more happy still if I shall be able, as I pass along, to relieve the fatigue of your honours, the benevolent companions of my journey, by imparting something of freshness and novelty to the prospect around us. To this course, I am also reconciled by a pretty confident opinion, the result of general study as well as of particular meditation, that the discussion in which we are engaged has no claim to that air of intricacy which it has assumed; that, on the contrary, it turns upon a few very plain and familiar principles, which, if kept steadily in view, will guide us in safety, through the worse than Cretan labyrinth of topics and authorities that seem to embarrass it, to such a conclusion as it may be fit for this Court to sanction by its judgment.

I shall in the outset dismiss from the cause whatever has been rather insinuated with a prudent-delicacy, than openly and directly pressed by my able opponents, with reference to the personal situation of the claimant, and of those with whom he is united in blood and interest. I am willing to admit that a Christian judicature may

dare to feel for a desolate foreigner who stands before it, not for life or death indeed, but for the fortunes of himself and his house. I am ready to concede, that when a friendly and a friendless stranger sues for the restoration of his all to human justice, she may sometimes *wish* to lay aside a portion of her sternness, to take him by the hand, and, exchanging her character for that of mercy, to raise him up from an abyss of doubt and fear to a pinnacle of hope and joy. In such circumstances, a temperate and guarded sympathy may not unfrequently be virtue. But this is the last place upon earth in which it can be necessary to state, that, if it be yielded to as a *motive of decision*, it ceases to be virtue, and becomes something infinitely worse than weakness. What may be the real value of Mr. Pinto's claim to our sympathy, it is impossible for us to be certain that we know; but thus much we are sure we know, that whatever may be its value in fact, in the balance of the law it is lighter than a feather shaken from a linnet's wing, lighter than the down that floats upon the breeze of summer. I throw into the opposite scale the ponderous claim of WAR; a claim of high concernment, not to us only, but to the world; a claim connected with the maritime strength of this maritime state, with public honour and individual enterprise, with all those passions and motives which can be made subservient to national success and glory in the hour of national trial and danger. I throw into the same scale

the venerable code of universal law, before which it is the duty of this Court, high as it is in dignity, and great as are its titles to reverence, to bow down with submission. I throw into the same scale a solemn treaty, binding upon the claimant and upon you. In a word, I throw into that scale the rights of belligerent America, and, as embodied with them, the rights of these captors, by whose efforts and at whose cost the naval exertions of the government have been seconded, until our once despised and drooping flag has been made to wave in triumph where neither France nor Spain could venture to show a prow. You may call these rights by what name you please. You may call them *iron* rights:—I care not: It is enough for me that they are **RIGHTS**. It is more than enough for me that they come before you encircled and adorned by the laurels which we have torn from the brow of the naval genius of England: that they come before you recommended, and endeared, and consecrated by a thousand recollections which it would be baseness and folly not to cherish, and that they are mingled in fancy and in fact with all the elements of our future greatness.

* * * * *

After discussing the two first of the above mentioned grounds of argument, Mr. Pinkney proceeded:

I come now to the third and last question, upon which, if I should be found to speak with more

confidence than may be thought to become me, I stand upon this apology, that I have never been able to persuade myself that it was any question at all. I have consulted upon it the reputed oracles of universal law, with a wish disrespectful to their high vocation, that they would *mislead* me into doubt. But—*pia sunt, nullumque nefas oracula saudent*. I have listened to the counsel for the claimant, with a hope produced by his reputation for abilities and learning, that his argument would shake from me the sturdy conviction which held me in its grasp, and would substitute for it that mild and convenient scepticism that excites without oppressing the mind, and summons an advocate to the best exertion of his faculties, without taking from him the prospect of success, and the assurance that his cause deserves it. I have listened, I say, and am as great an infidel as ever.

My learned colleague, in his discourse upon this branch of the subject, relied in some degree upon circumstances, supposed by him to be in evidence, but by our opponents believed to be merely assumed. I will not rely upon any circumstances but such as are admitted by us all. I take the broad and general ground, which does not require the aid of such special considerations as might be borrowed from the contested facts.

The facts which are not contested are these: The claimant, Manuel Pinto, intending to make a large shipment of British merchandise from

London (where he then was) to Buenos Ayres, (the place of his ordinary residence,) for himself and other Spaniards, and moreover to take on freight, and with a view to a commission on the sales, and a share in the profits, in South America, other merchandise belonging to British subjects, chartered at a fixed price, in the summer of 1813, the British ship the *Nereide*, for those purposes. The *Nereide* was armed, either at the time of the charter or afterwards, with ten guns; and her armament was authorized by the British government, and recognized by the usual document. The merchandise being all laden, the ship sailed upon her voyage under British convoy, (as her owner had in the charter party stipulated she should do,) with the claimant, Pinto, and several passengers introduced, as I think, by him, on board, and with sixteen or seventeen hands. She parted convoy soon afterwards, and was met by the Governor Tompkins privateer, by which she was conquered, seized, and brought in as prize, *after a resistance of several minutes, in the course of which the Nereide fired about twenty guns.* Some of the passengers co-operated in this resistance, but Pinto did not, nor as far as is known, did he encourage it.

I shall consider the case, then, as simply that of a neutral, who attempts to carry on his trade from a belligerent port, (not only under belligerent convoy,) but in a belligerent vessel of force, with full knowledge that she has capacity to resist the

commissioned vessels, and (if they lie in her way) to attack and subdue the defenceless merchant ships of the other belligerent, and with the further knowledge that her commander, over whom in this respect he has no control, has inclination and authority, and is bound by duty so to resist, and is inclined and authorized so to attack and subdue. I shall discuss it as the case of a neutral, who advisedly puts in motion, and connects his commerce and himself with a force thus qualified and conducted; who voluntarily identifies his commerce and himself with a hostile spirit, and authority, and duty, thus known to and uncontrollable by him; who steadily adheres to this anomalous fellowship, this unhallowed league between Neutrality and War, until in an evil hour it falls before the superior force of an American cruizer, when for the first time he insists upon dissolving the connexion, and demands to be regarded as an unsophisticated neutral, whom it would be barbarous to censure, and monstrous to visit with penalty. The gentlemen tell us that a neutral may do all this! I hold that he may not, and if he may, that he is a "chartered libertine," that he is *legibus solutus*, and may do *any* thing.

The boundaries which separate War from Neutrality are sometimes more faint and obscure than could be desired; but there never were any boundaries between them, or they must all have perished, if Neutrality can, as this new and most licentious creed declares, surround itself upon the

ocean with as much of hostile equipment as it can afford to purchase, if it can set forth upon the great common of the world, under the tutelary auspices and armed with the power of one belligerent, bidding defiance to and entering the lists of battle with the other, and at the same moment assume the aspect and robe of peace, and challenge all the immunities which belong only to submission.

My learned friends must bear with me if I say, that there is in this idea such an appearance of revolting incongruity, that it is difficult to restrain the understanding from rejecting it without inquiry, by a sort of intellectual instinct. It is, I admit, of a romantic and marvellous cast, and may on that account find favour with those who delight in paradox; but I am utterly at a loss to conjecture how a well regulated and disciplined judgment, for which the gentlemen on the other side are eminently distinguished, can receive it otherwise than as the mere figment of the brain of some ingenious artificer of wonders. The idea is formed by a union of the most repulsive ingredients. It exists by an unexampled reconciliation of mortal antipathies. It exhibits such a rare *discordia rerum*, such a stupendous society of jarring elements, or (to use an expression of Tacitus,) of *res insociabiles*, that it throws into the shade the wildest fictions of poetry. I entreat your honours to endeavour a personification of this motley notion, and to forgive me for presuming to inti-

mate, that if, after you have achieved it, you pronounce the notion to be correct, you will have gone a great way to prepare us, by the authority of your opinion, to receive as credible history, the worst parts of the mythology of the Pagan world. The Centaur and the Proteus of antiquity will be fabulous no longer. The prosopopœia, to which I invite you is scarcely, indeed, within the power of fancy, even in her most riotous and capricious mood, when she is best able and most disposed to force incompatibilities into fleeting and shadowy combination, but if you can accomplish it, will give you something like the kid and the lion, the lamb and the tiger portentously incorporated, with ferocity and meekness co-existent in the result, and equal as motives of action. It will give you a modern Amazon, more strangely constituted than those with whom ancient fable peopled the borders of the Thermodon—her voice compounded of the tremendous shout of the Minerva of Homer, and the gentle accents of a shepherdess of Arcadia—with all the faculties and inclinations of turbulent and masculine War, and all the retiring modesty of virgin Peace. We shall have in one personage the *pharetrata Camilla* of the *Æneid*, and the Peneian maid of the *Metamorphosis*. We shall have Neutrality, soft and gentle and defenceless in herself, yet clad in the panoply of her warlike neighbours—with the frown of defiance upon her brow, and the smile of conciliation upon her lip—with the spear of Achilles in one hand and a lying protestation

of innocence and helplessness unfolded in the other. Nay, if I may be allowed so bold a figure in a mere legal discussion, we shall have the branch of olive entwined around the bolt of Jove, and Neutrality in the act of hurling the latter under the deceitful cover of the former.

* * * * *

I must take the liberty to assert that if this be law, it is not that sort of law which Hooker speaks of, when, with the splendid magnificence of eastern metaphor, he says, that "her seat is the bosom of God, and her voice the harmony of the world." Such a chimera can never be fashioned into a judicial rule fit to be tolerated or calculated to endure. You may, I know, erect it into a rule; and when you do, I shall, in common with others, do my best to respect it; but until you do so, I am free to say, that in my humble judgment, it must rise upon the ruins of many a principle of peculiar sanctity and venerable antiquity, which "the wing of time has not yet brushed away," and which it will be your wisdom to preserve and perpetuate.

If I should be accused of having thus far spoken only or principally, in *metaphors*, I trust I am too honest not to plead guilty, and certainly I am not ashamed to do so: For, though my metaphors, hastily conceived and hazarded, will scarcely bear the test of a severe and vigorous criticism, and although I confess that under your indulgence I have been betrayed into the use of them, by the composition of this mixed and (for

a court of judicature) *uncommon* audience. I trust that they will be pardoned upon the ground that they serve to mark out and illustrate my general views, and to introduce my more particular *argument*.

I will begin by taking a rapid glance at the effect which this imagined license to neutrals, to charter the armed commercial vessels of a belligerent, may produce upon the safety of the unarmed trade of the opposite belligerent: and I deceive myself greatly if this will not of itself dispose us to reject the supposition of such a license.

It will not be denied that, if one neutral may hire such a vessel from a belligerent, *every* neutral may do so. The privilege does not exist at all, or it is universal. The consequence is, that the seas may be covered with the armed ships of one of the parties to the war by the direct procurement, and at the sole expense, of those who profess to be no parties to it. What becomes, then, of the defenceless trade of the other party to the war? Is it not exposed by this neutral interference to augmented peril, and encountered by a new repulsion? Are not the evils of its predicament inflamed by it? Is not a more ample hostility, a more fearful array of force provided for its oppression? Can it now pass at all where before it passed with difficulty and hazard? Can it now pass without danger where before it was in perfect safety?

Suppose one of the contending powers to be greatly superior in maritime means to the other;

what better expedient could be devised to make that superiority decisive and fatal, than to authorize neutrals to foster it into activity by subsidies under the name of freight, to draw it out upon the ocean with a ripe capacity for mischief, to spread it far and wide over its surface, and to send it across every path which the commerce of the weaker belligerent might otherwise hope to traverse? Call you that Neutrality which thus conceals beneath its appropriate vestment the giant limbs of War, and converts the charter-party of the counting-house into a commission of marque and reprisals; which makes of neutral trade a laboratory of belligerent annoyance; which with a perverse and pernicious industry warms a torpid serpent into life, and places it beneath the footsteps of a friend with a more appalling lustre on its crest and added venom in its sting; which for its selfish purposes feeds the fire of international discord, which it should rather labour to extinguish, and in a contest between the feeble and the strong enhances those inequalities that give encouragement to ambition and triumph to injustice?

I shall scarcely be told that this is an imaginary evil. I shall not, in this Court, hear it said, as I think it has elsewhere been said,* that the merchant vessel of a belligerent, (of *England* especially,) armed under the authority of the state, and sailing under a passport which recognizes

* At the hearing of the cause in the Court below.

that armament, has not a right to attack, and, if she can, to capture such enemy vessels as may chance to cross her track.

[MR. EMMETT.—*I shall maintain that she has no such right. She can capture only when she is herself assailed. She may be treated as a pirate, if she is the assailant. Where are the authorities that prove the contrary ?*]

Where are my authorities? They are every where. Common sense is authority enough upon such a point; and if the recorded opinions of jurists are required, they are already familiar to the learning of this Court. The doctrine results in the clearest manner from the nature of solemn war, as it is viewed by the law of nations; and it should seem rather to be the duty of my opponents to produce authorities to show that this obvious corollary has been so restrained and qualified by civil regulations, or convention, or usage, as no longer to exist in the extent which I ascribe to it. But I undertake, myself, to produce ample proof that my doctrine is in its utmost extent correct.

It is stated in *Rutherford's Institutes*, (vol. 2, p. 576—578,) that by the law of nations, a solemn war makes all the members of the one contending state the enemies of all the members of the other, and, as a consequence, that by that law a declaration of war does *in itself* authorize every citizen or subject of the nation which issues it to act hostilely against every citizen or subject of the

opposite nation. It is further stated, in the same book, (p. 577, 578,) that, as the nation which has declared war has authority over its own subjects, it may restrain them from acting against the other nation in any other manner than the public shall direct, and, of course, that notwithstanding the general power implied in a declaration of war, it may happen that none can act in war except those who have particular orders or commissions for this purpose. But, (it is added,) "this restraint, "and the legal necessity which follows from it, "that they who act should have particular orders "or commissions for what they do, arises, not from "the law of nations, or from the nature of war, "but from the civil authority of their own country. A declaration of war is, in its own nature, "a general commission to all the members of the "nation to act hostilely against all the members of "the adverse nation. And all restraints, that are "laid upon this general commission, and make "any particular orders or commissions necessary, "come from positive and civil institution." I might now ask, in my turn, where are the authorities (or documents of any sort) that show the imposition or existence of these restraints upon English vessels, without which restraints the *Nereide* might lawfully have *assailed* and (if strong enough) captured any American vessel that came in her way?

Vattel, who is not a very precise or scientific, although a very liberal writer, states the law as it is laid down by Professor Rutherford. (*Vattel*

Droit des Gens, liv. 5, ch. 15, s. 226.) He says, however, that a usage has grown up among the nations of Europe restrictive of the general right of the individual subjects of one power at war—"agir hostilement contre l'autre." "La nécessité d'un ordre particulier est si bien établi que lors même que la guerre est déclarée entre deux nations, si des paysans commettent d'eux-mêmes quelques hostilités, l'ennemi les traite sans ménagement, et les fait pendre, comme il feroit des voleurs ou des brigands." He adds, "Il en est de même de ceux qui vont en course sur mer. Une commission de leur prince, ou de l'amiral, peut seule les assurer, s'ils sont pris, d'être traités comme des prisonniers faits dans une guerre en forme." This has been relied upon, it seems, as in point to show that vessels in the predicament of the Nereide can have no authority to *attack* such enemy merchant ships as they may meet upon the ocean. But does the qualification produced by the usage which Vattel describes, (admitting it to be as he supposes,) amount to this?

The rule in Vattel, as it applies to the *peasantry of a country*, is connected with another—that they shall not ordinarily be made the objects of hostility. This exemption implies a corresponding forbearance on their part to mingle without the orders of the state in offensive war; and they are punished if they violate the condition of the immunity. This apparent severity is real mercy; for its object is to keep the peasantry at

home, and to confine the contentions, and consequently the direct effects of war to the troops who are appointed by the state to fight its battles. But a non-commissioned merchant vessel upon the high seas has nothing of this exemption. She cannot purchase it by forbearance—nay, she is at every moment the chosen object of hostility, as she is at every moment peculiarly exposed to it.

So far as the supposed usage applies to *privateers*, it has no bearing upon this case. It may be proper to confine to commissioned vessels the right of *cruizing for the mere purposes of war and prize*. Yet it may be equally proper to leave to an armed merchant vessel the smaller and incidental right (modified and checked in its exercise by such municipal regulations as each belligerent may and always does find it expedient to provide) to act offensively against the public enemies, if she chances to encounter them. At any rate, as the armament of a merchant vessel is sanctioned by the state to which she belongs, and is evidenced by its passport, it must depend altogether upon the laws of that state, whether this sanction amounts to a permission to commit hostilities *in transitu* or not. And I think I may venture to assert, that whatever inferences may be drawn from loose and general dicta to be found in a very few works upon the law of nations, no instance can be produced in which a merchant ship attacking an enemy vessel in the course of her voyage, has received the treatment which the learned council for the claimant

has allotted to such a proceeding, or has in any manner been punished, or even in any degree censured.

The notions of *Azuni* appear (as far as any intelligible notions can be collected from his work called a Treatise on the Maritime Law of Europe) to be similar to those of Vattel, and consequently, do not touch the point under consideration. This writer has not been able to satisfy himself as to the propriety of the practice of PRIVATEERING; or, rather, he is the undisguised advocate (in different parts of his book) of the two opposite opinions, that it is a *very bad practice*, and a *very good one*. Thus in Part 2d, ch. 4, s. 13, (p. 232 of the translation,) he inveighs with an amiable vehemence against it, (bringing the Abbé Mably to his assistance,) and in the next chapter (p. 350) gives us a proud panegyric upon it, and stigmatizes its censurers (and of course himself and the “*virtuous Mably*”) as “pretended philosophers,” and as shallow and malignant declaimers. Admit, however, that this *member of a score of academies* does seem to have been steadily of opinion, that a *cruizer*, without a commission, or something equivalent to a commission, must be regarded as “a pirate or sea-robber”—“*Per mares discurrit depredandi causa*,” is true, as he tells us, of a *privateer*, as well as of a *pirate*. They differ, as he also assures us, in this—that the latter pursues all vessels indiscriminately, (as Casaregis expresses it,) “*sine patentibus alicujus principis, ex propria tantum*

ac privatâ auctoritate;” or as Azuni himself phrases it, “without any *commission* or *passport* from any prince or sovereign state;” whilst the former attacks *public enemies only*, and has a special authority for that object. Now, although I am not convinced that a *cruizer* (*against public enemies*) is necessarily a pirate, because she wants a commission, and am even very sure of the contrary, I content myself with asking, if all this is not (as well as what has been quoted from Vattel) quite aside from the case of an armed merchant vessel, sailing under the passport of the sovereign, to whose subjects she belongs, not as a *cruizer* for prize or plunder, not *depradandi causâ*, but for commercial purposes, and upon a commercial voyage, and only using her authorized force as an assailant when an enemy more feeble than herself comes within her power?

But if a thousand such writers as Azuni, or even writers of a much higher order, had inculcated (as they do not) the general idea that an armed merchant vessel ought only to defend herself, and can never attack without becoming criminal, I should still have this successful reply, that it is not for a general rule that I am bound to contend; that the *Nereide* was an *English* ship; and that it is, therefore, enough for me to show upon this matter the *law of England* as it has always been held by her prize tribunals, and acquiesced in by the rest of the world. I might, indeed, maintain that when I show the unresisted and uncomplained of law and custom of that country upon a

great maritime subject, I have gone very far to show the law and custom of Europe, or at least what they ought to be ; but as my purpose does not require that I should occupy so wide a field, I shall use the English authorities merely as supporting the doctrine (unquestionable in itself) which I have quoted from Rutherford and Vattel, and as proving that England has not introduced, or made herself a party to, those restraints, which the right of offensive warfare, possessed upon original principles, by her armed merchant vessels, are alleged to be subject ; but, on the contrary, that her government and courts of prize always have asserted, in the most explicit manner, the existence of this right, and always have encouraged its practical exercise.

When the cases to which I am about to refer for this purpose come to be considered, it will be proper to bear in mind the distinction between the right which a capturing ship acquires in the thing captured, and the validity or legality of that capture. Without a constant attention to this distinction, which is manifestly the creature of municipal law, the English authorities cannot be understood. In England it depends upon the Prize Act and the royal proclamation, who shall be regularly entitled to the benefit of prizes. The property of all prizes is originally in the government, and it grants that property how and to whom it pleases. The interest in prize is *guaranteed* only to a *commissioned* captor. A non-commissioned vessel cannot, therefore, take for

her own benefit, but she may take (and that too as an *assailant*) for the benefit of the King or Lord High Admiral, and may expect (and always does receive) the whole or a part of the proceeds from the justice, or if you choose, the politic bounty of the crown, *judicially not arbitrarily* dispensed, *as a reward for the capture*. If this be so, there is no difference, according to the English law, between a commissioned and a non-commissioned captor, so far as regards the legality of the seizures made by them of the property of enemies. The sole difference is that a commissioned captor has a *positive* title (derived from the previous act of the government) to the thing taken, and that the non-commissioned captor has no such positive title, but is referred altogether for his reward to what is called the *discretion of the executive government*, which, however, is not a capricious discretion, but is to be guided and carried into effect by the Court of Admiralty, with a view to the circumstances of each case.

The cases to which I shall refer, (principally in Robinson's Admiralty Reports,) will be found, as I trust, to be perfectly conclusive on this subject.

The case of the *Haase* (Rob. Adm. Rep. vol. 1, p. 286) was that of an enemy ship, taken near the Cape of Good Hope, by a non-commissioned captor, and condemned by the High Court of Admiralty as a *droit*. The capturing ship (which was a *South Sea Whaler*) was the *assailant*, and

took possession of the prize without resistance. The Court gave *the whole of the proceeds* to the captors upon the ground of *peculiar merit* in following part of the cargo (which was gunpowder) on shore. Now if this capture was *piratical*, the condemnation as prize, and the *reward* decreed to the captors by way of encouraging them and others to the perpetration of similar outrages, will require more apology than the judgments of that great man, Sir William Scott, are usually supposed to stand in need of.

In the same book (in a note to the case of the *Rebeckah*, p. 231) the orders in council of 1665, (containing the grant to the Lord High Admiral of such prizes as are now called *Droits of Admiralty*) are set forth. The second article is, "That all enemies' ships and goods casually met "at sea, and seized by any vessel not commissioned, do belong to the Lord High Admiral." I suppose that nobody can fail to perceive that this article expressly recognizes the validity of the seizures of which it speaks, without regarding who may be the assailants, it being sufficient that the ships and goods belong to "enemies," and are "casually met at sea." The article not only recognizes the validity of every such seizure, and its legal effect as producing prize of war for the crown, but founds upon it a beneficial grant to the Lord High Admiral. And the subsequent practice has been in conformity with the article, except only that (the office of Lord High Admiral

being discontinued) the crown now takes the prize, (as it originally took it,) subject to the captors' claim in the nature of salvage or reward.

The case of the *San Bernardo*, in the same volume, (p. 178,) was that of a recapture in 1799, of a Spanish ship out of the hands of the French, by an English non-commissioned vessel. The recaptured vessel (being enemy's property) was condemned as a *droit*, and a reward out of the proceeds was decreed to the recaptors, although they were not, and could not (under the circumstances stated) be attacked by either the French vessel or the Spanish. Upon this case it is only necessary to remark, that if a non-commissioned vessel cannot *capture* an enemy's vessel, (without being first assailed,) neither can she *recapture* (unless on the same condition) an enemy vessel from an enemy vessel. In truth, such a recapture is rather a double capture, with reference to those upon whom it acts—since it acts upon two belligerents at the same time.

In the second volume of Robinson's Admiralty Reports, p. 284, in a note to the case of the *Cape of Good Hope*, the cases of the *Spitfire* and *Glutton* are reported. In both these cases, shares were allowed on account of the non-commissioned vessels (which not only *assailed* but *chased* for a considerable time) as *Droits of Admiralty*. These were cases of what is called co-OPERATION between commissioned and non-commissioned vessels; and, consequently, no cases could more ex-

plicitly assert the equality (not in point of innocence only, but in *legal effect*) between the acts of a non-commissioned vessel and those of a commissioned vessel in *attacking* and subduing the ship of an enemy. If the acts of the non-commissioned vessels were on these occasions considered as piratical, or in any degree unlawful, or otherwise reprehensible, nothing could have been less admissible than to let in the crown to shares on the foundation of those acts, to the prejudice of those who had an acknowledged right by their commission, by the King's proclamation, and by act of Parliament, to make the captures for their own exclusive benefit. And this impropriety was particularly manifest in the case of the *Spitfire*, who, although she chased in concert with the *Providence*, does not appear to have contributed to the capture otherwise than constructively.

If it should be said that the authority of the non-commissioned auxiliary captors depended upon and arose out of the authority, or out of the principal agency, of the commissioned captors with whom they acted, the answer is fourfold. 1st. That none of the other cases support such a notion. 2dly. That the authority of the commissioned captors was not a communicable authority. 3dly. That if the non-commissioned captors acted (in contemplation of law) under the authority of the commissions of the other ships, there could have been no question about *droit*—the whole would have been disposed of as prize un-

der the act of Parliament. And, 4thly, that in the case of the *Glutton*, she (having no commission at all) was, by reason of her being far to windward when the prize hove in sight, and of her using that advantage with promptitude and dexterity, without any orders from, or subserviency to, the ships that were commissioned, the main cause of the capture, and that it was certified by the commanders of the other ships that this was so, and that but for the *Glutton* the capture would have been impossible. The *Glutton*, the non-commissioned vessel, *led*, therefore, in this enterprize, and the others simply co-operated with her as a principal. So that the two cases, taken together, affirm distinctly the perfect legality of an *attack* by a non-commissioned captor, whether secondarily and in dependence upon, or primarily and (as *dux facti*) independently of, a commissioned captor, who co-operates with him; and, consequently, they affirm that a non-commissioned vessel may alone attack, and, if she is able, capture. And here it ought to be observed, that in the principal case, (the Cape of Good Hope,) the universal legality of attack and capture by non-commissioned vessels is taken (as how could it be otherwise?) for granted by the Court, and admitted by every body. Indeed, I feel confident, that it is now questioned for the first time.

To the cases already mentioned, may be added that of the *Fortuna*, (Rob. Adm. Rep. vol. 4, p. 78,) as that of a recapture of an English ship,

with a French cargo on board, by non-commissioned persons who were not assailed. The ship was restored to her owner, but the cargo was condemned as a *droit*, and the whole proceeds (of small amount) were decreed to the captors. Another protected and rewarded piracy!

In the case of the *Melomasne*, (Rob. Adm. Rep. vol. 5, p. 41,) the law is laid down without any exception, and in the most precise terms, that a capture by a non-commissioned vessel is rightful, although it enures to the benefit of the King in his office of Admiralty, in the manner already explained. Exclusively of the consideration that the Court, in laying down the general rule in that case, does not limit it to the case of *defence*, as it would undoubtedly have done if it had conceived the rule to be subject to that limitation, even if the case in which it was pronouncing its judgment was not that of an *attack*, it is decisive that by its sentence it sustains the capture (as a *droit*) by the non-commissioned captor, who was the sole *assailant*, and rejects the claim of Captain Aylmer of the *Dragon*, (a king's ship,) who claimed the prize against the Admiralty, as having been made under his authority, which authority was considered by the Court, however, as amounting to no authority at all, and therefore as leaving the case to be dealt with as that of a capture by a non-commissioned boat, and consequently a capture for the benefit of the crown.

It would be idle upon such a point to accumu-

late authorities. It is sufficient to say that the High Court of Admiralty of England, which has for many years been adorned by the most illustrious of jurists, and one of the most amiable of mankind, has been in the habit of offering bounties to piracy and temptations to licentious plunder, if my learned friend be warranted in his doctrine.

I could, if it were necessary, cite many other cases, (some of which will be found in the Appendix to the second volume of Dr. Brown's Civil and Admiralty Law,) but I hold this matter to be too clear to be gravely contested in a tribunal like this.

I assume, then, the truth of the position with which in this branch of the argument I commenced, and I ask with confidence, if it is to be endured, that neutrals shall assemble, on the high road of trade for the purposes of any commerce, (whether altogether their own or partly their own, and partly that of a belligerent, as would seem to be the case on this occasion,) ships fitted for warlike purposes as well as for defence, belonging to, and commanded, and managed by the subjects of a belligerent, and therefore having power, as far as it goes, and inclination without limit or control, to harm the opposite belligerent by annoying his trade as well as by resisting his right of search? I ask if it is to be endured, that neutrals shall thus make themselves the allies of the English law of *droits*, an important portion of the

English system of naval hostility, tremendous enough in the actual state of the world without its aid? It is with you to sanction this anomaly if you choose, and if you do sanction it, the nation must bear the consequences; but I have a firm persuasion that we shall not hastily be saddled with a doctrine so fatal in its tendency, especially as the authority of your judgment, great as it is, will not, undoubtedly will not, obtain for us a reciprocal sacrifice in any country upon earth.

[He then proceeds to consider the opposite argument, that the text writers on the law of nations having made no exception to the general right of neutrals to carry their goods in enemy ships, this right must extend even to armed vessels.]

The learned gentlemen refer us in the first place to Bynkershoek, and Ward, and Azuni,* and other writers upon the law of nations, who are imagined to have given opinions upon this point. These writers do certainly concur in declaring that neutrals cannot be prevented from employing the vessels of either of the belligerents for the purpose of continuing their lawful commerce; but they lend no colour to the doctrine that the *armed* vessels of a belligerent may, by being so employed, be made the means of withdrawing the cargo from the inspection of the other belligerent,

* Bynk. Quæst. Jur. Pub. l. 1, c. 13. Azuni, vol. 2, p. 194. 196. (Mr. Johnson's Transl.) Vattel, Droit des Gens, l. 3, c. 7, s. 116, et seq. Grotius, de J. Bac. P. l. 3, c. 6. Ward on Contraband, p. 136.

as well as of augmenting the perils to which the unarmed trade of that belligerent would otherwise be exposed. The treatises which have been referred to would be very good authorities to prove (if it were denied) that enemy ships do not necessarily make enemy goods. They go so far, and no farther. The single purpose of their authors was to investigate and condemn the sweeping rule, adopted by several maritime states, and at one time approved by Grotius—"ex navibus res prædæ subjiciuntur." And this purpose did not call upon them to settle, or even consider, the matter of the present discussion. The question whether a *hostile flag* ought of itself to infect with a hostile character the goods of a friend, may be answered in the negative, without in the least affecting the question, whether, if a *hostile force* be added to the flag, a neutral can advisedly hire it without responsibility for the consequences. The first question looks exclusively to the national character of a commercial vehicle, the second to a military adjunct, which in no degree contributes to constitute that character, or to form that vehicle. A ship is as much an enemy ship, and as completely a conveyance for neutral commodities, without an armament as with it. An armament makes her more than a mere commercial conveyance for the purposes of a neutral, by superinducing warlike accompaniments, and worse than such a conveyance, by introducing an incumbrance unfriendly (nautically speaking) to speed

and safety. In a word, the general proposition that the character of the bottom does not *ipso jure* fix the character of the goods, is entirely wide of a proposition which asserts the effect of hostile equipment and resistance, let the bottom be what it may; and, consequently, nothing is gained, to the prejudice of the latter proposition, by showing that jurists are agreed in favour of the former.

But it is, nevertheless, possible that we may discover, either in the terms in which these great teachers of legal wisdom have enunciated the former proposition, or in their reasonings upon it, a sufficiently clear indication of their opinion upon the subject of our inquiry. It is, indeed, to be expected that their language and illustrations will point to a universal conclusion, spreading itself over every variety and combination of circumstances, if such a conclusion was intended; and, on the contrary, that, if a conclusion, applicable simply to the quality and character of the owner of the vehicle employed by a neutral merchant, was in view, we shall find the phraseology which expresses it, and the illustrations which recommend it, suited to that view.

The 13th chapter of the first book of Bynkershoek's *Quæstiones Juris Publici*, to which we have been referred, professes to treat "*De amicorum bonis, in hostium navibus repertis*," and by the statement of a doubt ascribed to Grotius—"an *bona amicorum, in hostium navibus reperta*,

“pro hostilibus essent habenda,” announces the question to be disposed of. This question, resting upon the single fact, that the ship in which the friendly goods are found, *belongs to an enemy*, obviously inquires nothing more than whether, *on that account*, the goods may be confiscated—and throughout the chapter it is so treated. “Nam cur mihi non liceat uti *nave* amici mei, quam quam tui hostis, *ad transvehendas merces meas?*” Quare si *ejus navem* operamque conduxerim, ut res meas trans mare vehat,” &c. —“pro mercede ejus uti *nave* ad utilitatem meam,” &c. In all this, and in whatever else the chapter contains, there is no allusion to any thing but the mere vehicle “*ad transvehendas merces*,” and to the *ownership* of that vehicle. The phraseology is appropriate to define a merchant vessel in her ordinary state, with nothing to distinguish her but her enemy character. It is not adapted to convey the idea of a vessel which has passed into a new state by the union of faculties for war with those for transportation.

As to the reasoning, it manifestly stops at the point I have mentioned. “Licet mihi cum hoste tuo commercia frequentare ; quod si liceat, licet quoque cum eo quoscunque contractus celebrare, emere, vendere, locare, conducere, atque ita porro.” “Cape quodcunque est hostis tui ; sed mihi redde quod meum est, quia amicus tuus sum, et *impositione rerum mearum nihil molitus sum in necem tuam.*” The general posi-

tion that I have a right to trade with your enemy, and consequently to make contracts with him, is here found without any one of the limits which belong to it; but we know that Bynkershoek could not and did not mean to have it so understood. He was aware, and has elsewhere shown, that it was restricted by the state of war. He knew, for example, that a neutral could generally buy, sell, hire, and let to hire, from and to a belligerent: but not hire or sell to a belligerent a vessel of war, or even a passport; or contract to send him contraband, or to carry his despatches, or to supply his blockaded ports, or to disguise his goods as his own, or to send him goods to become his on their arrival, to save the risk of capture *in transitu*. We can only account for his arguing in this place upon the general right without noticing any modification which war imposed upon it, by supposing that he was reasoning upon the common condition of neutral traffic unassociated with the use of force, or with any other hostile quality, and in no situation to come in collision with any of the parties to the war. And this supposition is confirmed by the quiet assumption (without proof) with which the observation last quoted concludes, that by the employment of the enemy ship the neutral *attempts nothing to the prejudice of the opposite belligerent*. This assumption was not unnatural, if none but an *unarmed* vessel was in his mind: but if his view extended to a ship provided with warlike equipment, it was rather an

extraordinary postulate for so able a reasoner as Bynkershoek to assume.

The passage in the controversial treatise published by Mr. Ward in 1801, on the relative rights and duties of belligerent and neutral powers,^{*} which has been referred to on the other side, runs thus : “ The right of an impartial neutral to continue his trade with each belligerent, *so long as that trade can in no respect do injury to either*, is certainly uncontested and incontestible ; and it would be difficult to show the injury, or what interference there is in the war, by placing such goods as are sacred, from their neutrality, and have, therefore, a right of passage all over the world, under the care and protection of a belligerent *flag*. Something in point of prudence may be urged, to prevent their being exposed to the accidents of war ; but if the neutral chooses to risk this, it is impossible, I think, to conceive a well-founded reason for supposing, that *any confliction of rights* between him and the other belligerent can arise from the procedure. This, then, seems an innocent, and, therefore, a natural right in the neutral ; as such formed one of the provisions of the *consolato*, and as such was approved by Bynkershoek,” &c. (Q. J. Pub. c. xiv.), p. 136. Now what is maintained in this passage is, that a

*[The title of this book is “ An Essay on Contraband : being a continuation of the Treatise of the Relative Rights and Duties of Belligerent and Neutral Nations in Maritime Affairs.”]

neutral may trade in a belligerent *vessel* and under a belligerent *flag*, in opposition to the doctrine, that the *national character* of the ship ought to conclude that of the cargo—or as he elsewhere phrases it, “that all should obey the national character of the ship.” The author states expressly, that the right of which he is speaking, and which only he had in his view, formed one of the provisions of the *consolato*, and was approved by Bynkershoek. What right was approved by Bynkershoek, we have already seen; and every body knows that the *consolato* refers only to the property of the vessel, and makes no provision for the case of a military equipment which nothing but a direct provision could sanction. Besides, the main ground upon which Mr. Ward places the right is that the goods are *sacred from their neutrality*. Now it is impossible that this should be known without the exercise of that right of visitation and search, to which he insists that every belligerent is entitled: and consequently he must mean that the belligerent vessel which carries the goods said to be neutral, is not to be in a situation to contest by force the exercise of that right. Moreover, the expressions, “so long as “that trade can in no respect do injury to either” show his meaning to be that it is not to be a trade, which provides resistance to the right of search, and increases the hostile means of one of the belligerents on the seas. And, again, when in his reasoning he says that he cannot conceive

how the privilege which he admits can produce "any confliction of rights" between the neutral and the opposite belligerent, it is quite impossible that he should have in his mind the case of a deliberate resistance to that very right of visitation and search which it was the great object of his treatise to uphold.

In truth, Mr. Ward is in this place contending that the principle of "free ships free goods" is not "a natural right,"—and he endeavours to prove it by showing (among other things) that the principle which is usually associated with it in treaties,—that "enemy ships shall make enemy goods" is a violation of natural right. For this purpose it was not necessary to discuss or decide the present question: and, accordingly, he does not meddle with it, unless what he says about "the accidents of war," to which neutral property is exposed in belligerent vessels should be thought to touch it.

The first passage referred to in Azuni's book amounts only to this—that neutrals cannot be prevented from employing *the vessels of either of the belligerents* for the purpose of continuing their peace trade, unless by interfering in the war "*they depart from that perfect neutrality which they are bound to observe.*" It is a gratuitous supposition that this passage was meant to include vessels fitted for aggression and resistance. Nay—the supposition is worse than gratuitous. It is impliedly forbidden by the reference to the

peace trade of the neutral as that which is to be authorized in the vessels alluded to, and by the exception of all cases in which the neutral interferes in the war, or in any degree deserts his neutrality.

Such a large exception goes the whole length of my doctrine, if it means any thing: and there was no necessity to make it special, unless it was presumed that common sense had left the world. It was too obvious to require any particular mention, that it was an interposition in the war and inconsistent with pure neutrality to employ a vessel equipped for battle and certain to engage in it (to exempt the neutral from the observance of his known duties) if it could be done with a prospect of success, and certain also to act *offensively* if a suitable occasion presented itself. It was enough to lay down the wide caution against *any use or employment of hostile force*, which not being capable of any check, on account of the direction to which it is subject and the disposition which belongs to it, cannot be employed without embarking in the war and taking an unneutral attitude. We are told by Ward, (vol. II. p. 10,) in the language of Hubner, who has been called "the great champion of neutral rights," that "Toute neutralité consiste dans une *inaction en-tière relativement à la guerre*:" And I know not how a neutral can be said to be wholly inactive relatively to the war, who allies himself by compact with warlike means and hostile disposi-

tions and intentions, which, when he has once connected himself with them, he knows he cannot restrain, and to which he alone gives all the activity and all the power of mischief which they possess. It is difficult to conceive how he who has prepared and hired the power of warlike combat, with a knowledge that the desire, duty, and determination to combat are united with that power, can be said to be thus inactive, and especially when combat has actually followed his arrangements as their regular consequence. Self-evident propositions do not require to be set forth in detail, and the wonder is that we should expect it. On the other hand, if a neutral can do this, it is but reasonable to suppose that his right to do so would be stated with precision even by such sciolists as Azuni.

But if the exception in Azuni does not plainly exclude, (as I have no doubt it does,) from the neutral's privileges, the employment of ships equipped for battle, it does at any rate reduce all that he says as an authority on the extent of that privilege to nothing, since the phraseology in which Azuni has defined the privilege is at least as equivocal as the exception. An ambiguous general rule given by a feeble writer, who qualifies it by an ambiguous general exception, may afford matter for controversy, but can scarcely contribute to settle one.

Heineccius, Grotius, Hubner, Vattel, and others are quoted by Azuni, (vol. 2, p. 194, 195,)

but they simply state, what doubtless Azuni meant to state, the general doctrine (which I do not mean to dispute, although it was once disputed) that friendly goods are not prize merely because taken in a vessel belonging to the enemy. It is impossible to make any thing like an authority, for the doctrine of the learned counsel, out of any or all of these loose dicta, the subject of which was, as I have already said, the effect of the flag and ownership of the vessel upon the character of the cargo.

The other passage in Azuni which the counsel refers to is no more to his purpose than that which I have examined.

“ Belligerents have no right over the effects of friends and neutrals, in whatever place they may be found, though within the *territory* or in the *vessels* of enemies. For this reason, when a maritime city is taken by assault, or in any other way, the belligerent cannot seize the neutral vessels found in the port, nor their cargoes, unless they are contraband of war, and unless the captains have taken up arms or voluntarily seconded the enemy in their resistance. For a stronger reason ought the goods of neutrals, found on board the *ship* of an enemy, to be considered as free, since it cannot be regarded as the territory of the enemy.”

Now there is nothing in this passage which requires to be noticed, save only what relates to neutral vessels and cargoes found in the port of a captured city, which seems to be much confided

in by the learned counsel as favourable to his case! I shall concede that the law is as Azuni states it. I only marvel that it is thought to have any bearing upon the present subject.

It cannot be doubted that a neutral who is found on a lawful errand, in a captured place on land with which he has contracted no hostile obligations of any sort, (as is supposed in the case put by Azuni) is innocent in every view, and cannot be the lawful object of hostility: if it were otherwise, every belligerent maritime city would be in a state of constructive blockade of a perfectly new invention. The supposed position of the neutral relatively to the captured place necessarily excludes the idea of penalty. He has not given, or contributed to give to that place the military capacity which it has exerted. He did not erect, or assist in erecting its fortifications, in levying or paying its garrison, in furnishing its arms or stores. He has not hired those fortifications with their appendages, or in any way produced or increased their means of annoyance or defence. He has no connexion with the place, further than that he is in it, upon a fair and altogether neutral motive, not injurious to any body, or capable of becoming so. But suppose that, for the purposes of his trade, or for any other purpose, he had hired the fortresses, the troops, the cannon, the ammunition, the provisions, and all the means and implements of war, with which, as with a military force, he had united himself and his concerns.

Suppose that the fortifications had been erected for his accommodation, or being erected before, had become his by special covenant, that but for his views and conduct they had been impotent and harmless, or had not been there at all: suppose, in a word, that he is not only the tenant of them, but creator of all that constitutes their faculty to mischief his friends, and that he has left the command of them to those who are at public enmity with these friends, without reserving any power in himself to counteract the effects of that enmity, and that then he has placed his property and himself under their auspices! Will the learned gentleman tell us that he and his property would then be neutral in the view of those by whom the place is assailed and captured, and against whom it has used the power which he has furnished, or contributed to furnish to it? I am sure he will not. Yet this is the analogous case. The *Nereide* was a moveable fortress which the claimant brought upon the seas. She would not have been there but for him. Her armament was *his* armament. Her power was *his* power. He drew that armament and that power into conflict, or into the opportunity of conflict with the opposite belligerent, with a thorough conviction that conflict and opportunity would, and must be the same thing. From the master to the meanest sailor, every man on board, fought at his cost and by his original procurement. But in the other case, it is assumed by Azuni that the neutral has nothing to do with

the matter. He entered the place before it was attacked. He had the clearest right to do so. He sought no protection from the force on which it relied for its defence. He did nothing towards the organization or maintenance of that force. He made no covenant with it, or its owners. He did not employ it, or assist in its operations : and, consequently, had no more connexion with it than if he and his property had been on the opposite point of the globe. The place would not have been the less attacked if he and his property had not been in it, nor would it have been better or worse defended. The whole transaction passes without involving or touching him in the slightest manner.

We have then, at the threshold, a wide distinction between Azuni's case and ours : but this is not all, although it is sufficient. The resistance of a city attacked by its enemies *cannot* be inconsistent with the obligations of a neutral who finds himself there, unless he mixes in it. What right of the assailing party is that resistance calculated to violate with regard to *him* ? Certainly none. The right of visitation and search (the only one that can be imagined to be material in this view) does not apply to the subject. He is, for the present, rightfully out of the reach of it : and can, in fact, do nothing to facilitate visitation and search otherwise than by taking his goods out of port to the assailant, or by co-operating with the assailant to subdue the place. The first, undoubtedly,

he is not obliged to do, and probably cannot, and will not be permitted to do, even if there be time for it. The second would make him a traitor to the city which had hospitably received him. During the contention of two hostile forces, (neither of which he has raised up, or fostered, or adopted,) he is justified in remaining a mere spectator, and is bound to do so. The right of visitation and search, therefore, (of which, indeed, the ocean is the only theatre,) is not infringed on this occasion. What other right then is violated? I know of none: I have heard of none. But this is not so in our case, if we have succeeded, or should yet succeed, in proving that the claimant acted unlawfully from the first preparation of his expedition to its last catastrophe—that he violated his neutral duties by employing hostile force at all—and that when this hostile force resisted the visitation and search of an American cruiser, the climax of illegality was completed.

It is said, however, that Mr. Pinto, as a merchant of Buenos Ayres, had a peculiar justification for this armament, in the danger to his property and himself produced by the cruisers of Carthagena; that it was the usage of this trade, and the only adequate mode of carrying it on, before the breaking out of the war between the United States and England; and that Mr. Pinto intended no resistance to United States' cruisers.

As to his *intentions*, I do not profess to know, *with certainty*, what they were, and I suppose

that his counsel know as little of the matter as I do. It may be very well for them and him to say that it was *not* his intention that the privateers of the United States should be resisted, when they could be resisted with a prospect of success, and thus he prevented from interrupting a voyage, which promised to be so lucrative, by the capture of the vessel in which he was performing it: but I am not apprized of the proofs by which he could be judicially exculpated from such an intention if I chose, as my learned colleague has done, to press it against him. I do not think it material, however. For let his intentions in this particular have been what they might, the law infers from his conduct all that my argument requires. Mr. Pinto set in motion upon the Atlantic a warlike force, *hostile by notorious duty* to the United States, a duty which he was bound to know he could not neutralize, and the effects of which he was also bound to know he could not check. Every man must be taken to intend, where intention is important, the natural and ordinary results of his own acts. The municipal law of our country, and every civilized country, proceeds upon that rule, so as always to create responsibility for those results. The particular intention does not need to be inquired into. It is enough that the result in question ought to have been foreseen. Thus (to put a familiar case) if a man rides a horse, accustomed to strike, into a crowd, upon an errand ever so lawful, he is liable

for the mischief which ensues, whether he intended that mischief or not.

The natural consequences of Mr. Pinto's acts were, that if an American cruizer (not of an overwhelming force) met him in his voyage, resistance would be made, even if he should forbid it, to the right of that cruizer to examine his property; and that, if he was met by an unarmed American vessel of sufficient value to tempt the commander of the *Nereide*, that vessel would be assailed. The first of these consequences has happened, and by every system of law known to mankind would be visited with penalty.

The right of Mr. Pinto to make a provision of defensive force against Carthagena cruizers cannot serve him in this cause. If he armed for limited purposes, it was for him to take care that he *suit*ed his armament to those purposes, and that its exertions were confined to them. He could not arm in such a way as to give *uncontrollable power* (where there already existed the *desire*) to exceed those purposes to the injury of those against whom he had no right to arm. If he does so arm, all that I insist is that he does it at his peril. If his purpose is exceeded, from causes palpably inherent in the nature of the armament, and the direction under which it is placed, it cannot be unreasonable to say that he must at least answer for that *surplus*, if it were only upon the maxim *respondeat superior*; a maxim as universal in the law of prize as any maxim can be: for although

in the municipal law it generally imports only civil responsibility, in the *jus gentium* it produces confiscation. Even in the municipal law it is a cardinal rule *sic utere tuo ut alienum non ledas*; and this rule applied to Mr. Pinto would of itself restrict his right of arming to a mode that would be compatible with the rights of others. He who should go into the streets accompanied by a mastiff of a surly and ungovernable temper and accustomed to bite, (I mean no slur upon any body by this homely comparison) even although he goes upon lawful business, and makes the dog his companion with a view to his defence against some ruffian who has threatened him, must abide the consequences if his associate bites those who are his master's friends, and who have, moreover, a right to stop him on his way for the purpose of some inquiry, and who have been bitten in the attempt to exercise that right.

As to what is said of the manner of carrying on this trade before the breaking out of the war between the United States and England—is it meant to tell us that a trader continues after the breaking out of a war to have all the rights which he possessed before, merely because he is a neutral? That the war does not affect all his previous rights or habits I admit; but it does affect them largely, nevertheless; and it affects them exactly as far as his former rights and habits would now in their exercise and continuance be an interference in the war. Thus before the commence-

ment of hostilities he could carry articles usually denominated contraband of war. After hostilities commence, he does so at the hazard of seizure and confiscation, even if his peace traffic had been to a great extent, or altogether in such articles. And why is this so? Simply because the carrying of such articles in peace was injurious to nobody, but upon the breaking out of the war does injury to one of the belligerents with reference to the war. And various other instances might be given of the same class. If, indeed, that which was the previous trade of a neutral has no relation in its substance or manner of conducting it to hostility, the war does not affect it otherwise than by producing detention for inquiry and search; but when it has that relation (as it always has when by seeking the armed ships of a belligerent it generates collisions) the war invariably affects and reduces it.

Even if it be true, therefore, (of which however there is no proof in the cause) that British armed vessels had before been used in this trade, the moment the war broke out between the United States and England, the continuance of that practice became as completely unneutral as did the carrying of articles of contraband, and became liable to the same penal visitation. It would be idle to multiply words upon such a point.

It has further been suggested that if Mr. Pinto had not used an armed ship of England, he could not have undertaken his voyage at all. Be it so.

Although there is no evidence to countenance such an apology, I am willing without reserve to admit the fact, while I utterly deny the conclusion of law. We are fallen upon strange times, when every sort of absurdity—I beg my learned opponents to pardon the accidental freedom of this expression, and to believe that I respect them both too much to be willing to give umbrage to either. To one of them, indeed, I have heretofore given unintentional pain, by observations to which the influence of accidental excitement imparted the appearance of unkind criticism.* The manner in which he replied to those observations reproached me by its forbearance and urbanity, and could not fail to hasten the repentance which reflection alone would have produced, and which I am glad to have so public an occasion of avowing. I offer him a gratuitous and cheerful atonement—cheerful because it puts me to rights with myself, and because it is tendered not to ignorance and presumption, but to the highest worth in intellect and morals, enhanced by such eloquence as few may hope to equal—to an interesting stranger whom adversity has tried and affliction struck severely to the heart—to an exile whom any country might be proud to receive, and every man of a generous temper would be ashamed to offend. I feel relieved by this atonement, and

* [In the case of the Mary, argued at the same term, in which Mr. Emmet (of counsel for the captors) spoke, as Mr. Pinkney supposed, a little too harshly of one of the claimants.]

proceed with more alacrity. I say that it is passing strange that in the nineteenth century we should have it insinuated that the provisions of public law, or of *any* law, are to bend before the private convenience of an individual trader. The law of nations did not *compel* Mr. Pinto to trade. It *allowed* him to do so, if he could with innocence. It did not convert his rights into obligations: It left them as it found them, except only that it impressed upon them (with a view to the state of war which had supervened) the conditions and qualifications annexed to his predicament as a neutral. If he could safely and advantageously trade in this new state of his rights, it was well; if not, it was either his duty to *forbear to trade* at all, or to make up his mind to *defy the consequences*. And is this such a harsh alternative? Is it not the dilemma to which God and the laws have reduced us all—and some of us more emphatically than others? Is not the vocation of every man in society more or less limited by positive institution, and does not the law of nations deal with, what I may call, a benignant profusion in such limitations? War brings to a neutral its benefits and its disadvantages. For its benefits he is indebted to the lamentable discord and misery of his fellow creatures, and he should, therefore, bear, not merely with a *philosophic*, but with a *Christian* patience, the evils with which these benefits are alloyed. It is fortunate for the world that they are so alloyed, and heaven forbid that the

time should ever arrive when one portion of the human race should feel too deep an interest in perpetuating the destructive quarrels of their brethren.

But is there any thing new or peculiar in this alternative? What is the predicament of a neutral merchant domiciled before the war in one of the belligerent countries? Is he not called upon by the law of prize to cease to trade; or to trade upon belligerent responsibility? Does not that law tell him, "Abandon your commerce! although it was begun in peace, and perhaps established by great sacrifices, prepare to find it treated as the commerce of the belligerent with whom you have identified yourself?" Does it not announce the same sentence to the dealer in articles of contraband—to the trader with ports which the belligerent chooses to blockade—to the ship-owner who has transport vessels to let to foreign governments? In those cases, it does not say—you shall not trade, or hire your ships as you were used to do—but merely that if you do, and are captured, your property shall be forfeited as if it were the property of enemies. I ask if the man who lives with innocence, in peace, upon the profits of carrying contraband articles is less oppressed by the alternative which is presented to his choice, than Mr. Pinto by that which I hold was tendered to him, if his situation be truly stated, not exaggerated by his counsel? I ask if his situation was worse than that of any other neutral whose

ordinary peace-traffic is reduced or annihilated by the mighty instrumentality of war?

But it is said that the resistance which was made, was a rightful resistance on the part of the commander of the *Nereide*, by whom it was made in fact. It was so. And can Mr. Pinto take refuge behind the peculiar rights of his associates without sharing the legal effects of their defeat? Nothing could be more intolerable than such a doctrine. A belligerent has a right to break a blockade if he can. But can a neutral, therefore, put himself under the shade of that right, and in case the belligerent master should make the attempt and succeed, take the profit, and if he fails, claim immunity from confiscation by an ingenious reinforcement of his own rights with those of the belligerent master? Or if the conduct of the belligerent master shall be thought to be insufficient to impute to the owner of the cargo the *mens rea* in the case of blockade, by a sweeping presumption that the vessel is going into the blockaded port in the service of the cargo only—what shall we say to the case of contraband, which must be put on board by the owner with a knowledge that it will be exposed to the peril of capture, and if captured to the certainty of confiscation? A belligerent master has a right to carry contraband if he can—and only superior force can prevent him. But, surely, a neutral cannot so avail himself of that right, as to ship in safety contraband articles in a belligerent vessel.

If he could, he would have a larger and more effectual right than that under which he takes shelter; for the belligerent's right is subject to be defeated by force, and so much of his property as is engaged in the enterprize becomes prize of war, if he is conquered. Just as in this case, his right of resistance is met on the other side by a right to attack and seize as prize, and every thing depends upon the issue of the combat. It is, indeed, self-evident that a neutral, who is driven to rely upon the rights of war, vested in others, not himself, leans upon a broken reed, if those rights fail of being successfully maintained against the opposite party to the war: and sure I am that no case can be imagined, in which a neutral can cover himself with the right of a belligerent whom he chooses to employ, and thus claim the combined advantages of a belligerent and a neutral character. If he can advance such a claim, the cases of domicile have all been adjudged upon false principles, for they expressly affirm the contrary, and stand upon no other reason.

But the true light in which to view this point is, that the right of resistance vested in the belligerent master is precisely that which aggravates instead of taking away the guilt of the neutral charterer, or in other words, is exactly the consideration which ought to make the resistance his own in the eye of the law, and, consequently, to render him and his property liable to share the fate of the belligerent master and vessel.

It is indisputable that if Mr. Pinto, instead of chartering the *Nereide*, had hired a neutral ship, and the neutral master, without his concurrence, had resisted visitation and search, the goods of Pinto would have been prize as well as the neutral vessel. We have for this the express authority of Sir William Scott, in the celebrated case of the Swedish convoy and others,* “The penalty for the violent contravention of this right, is the confiscation of *the property*” (cargo as well as vessel) “so withheld from visitation and search.”

Upon what ground is the cargo forfeited in that case? Upon the ground that the master’s resistance withholds the cargo from visitation and search, and that the owner of it is answerable for the master’s conduct in that respect, although the master is not, strictly speaking, the agent of the cargo, and the owner of the cargo is not generally affected by his acts in the view of a Court of Prize. The extension of the penalty of confiscation to all the property, withheld by the resistance of the neutral master from visitation and search, whether it belongs to the owner of the vessel or not, proceeds, undoubtedly, from the importance attached to the right with which such resistance interferes—to a right without which all the other belligerent rights with which the law of prize is

* The *Maria*, Rob. Adm. Rep. vol. 1, p. 287. The *Elsebe*, Rob. Adm. Rep. vol. 5, p. 174. The *Catharina Elizabeth*, *ib.* 232. The *Despatch*, Rob. Adm. Rep. 280.

concerned, are mere shadows. The owner of a neutral cargo, forfeited by the resistance of the master of a neutral ship, would seem to have some show of reason for his complaint against the rigour of such an indiscriminate punishment of the innocent and the guilty. He might urge with great plausibility, that as he had not partaken in any manner the resistance—as he not only did not command, but did not wish it—as he was justified, when he shipped his goods, in relying upon the presumption that a neutral master would fulfil his neutral duties, and would not have recourse to hostile resistance to the right of visiting and searching his vessel and those goods, he ought not to be made accountable for that resistance. But with what plausibility can the charterer of a belligerent vessel, which has by resistance withheld his property from visitation and search, claim to be exempted from the utmost severity of the rule? When he chartered such a vessel and shipped his goods, had he any ground for presuming that the belligerent master would forbear resistance to an enemy cruiser? Did he not, on the contrary, know that he would resist, and that it would be out of his power to prevent him? Did he not go to sea with an absolute assurance that his goods would be withheld from the visitation and search of the opposite belligerent by all the resistance that could be made? Nay, further—is not the neutral owner of the goods interested that resistance should be made, even with refer-

ence to the vessel, when it can be made effectually—since if the vessel be seized as prize, the voyage is broken up, and the hopes of profit which depended upon it utterly blasted? Such was Mr. Pinto's predicament; and it will not be believed that he would see with disapprobation the repulse of a cruizer of this country attempting to capture the *Nereide*, and to carry her any where but to Buenos Ayres.

With regard to a neutral, therefore, who charters an armed belligerent vessel, the penalty of confiscation for resistance by that vessel is unimpeachably just. If it is established that a neutral should be responsible for the resistance of the master of a neutral vessel, which he could not foresee, had no reason to expect, and no interest to produce, can it be unfit that he should be responsible for the regular and foreseen resistance of the master of an armed belligerent vessel chartered by him, which resistance he could not help foreseeing, which if he did not direct, he must have confidently expected, and which his interest required should be made as often as it happened to be practicable? It would be intolerable that he who has done every thing which by all reasonable calculation would subject his property to the full exercise of the right of visitation and search, shall be punished with confiscation for the disappointment of that calculation, and that he who has done every thing which was adapted to defeat that right, and who has spontaneously given

himself an interest in defeating it, should be rewarded with restitution, (or to speak more correctly,) by a concession of all the benefits of successful resistance, and by an exemption from all its penal consequences in case of failure.

I stand upon all just principles of law and reason, therefore, when I say, that the known right and inclination of the master of the *Nereide*, combined with his capacity, obtained at Pinto's expense, to resist a cruizer of the United States, is so far from being a foundation on which to build his innocence, that it is the clearest and most conclusive inducement to consider his property as prize. If one were called upon to select a case in which the confiscation of the cargo of a resisting vessel was not only lawful, but equitable, it would be a case in which a neutral abusing the indulgence extended to him by the modern law of nations to employ a belligerent vehicle, employs just such a vehicle as under belligerent command and conduct will inevitably be made to withdraw his property from examination, so far as its physical force can so withdraw it. And certainly a greater anomaly can scarcely be conceived, than that I shall answer for the hostile conduct of him, upon whose neutral and peaceful conduct I was warranted, when I employed him, to rely; and yet shall not answer for the hostile conduct of him, from whom I was warranted, when I employed him, in anticipating nothing but hostility and violence!

[Mr. Pinkney then examined the case of the Swedish convoy in 1798, and insisted that there was no difference between a ship sailing under protection of a resisting convoy and goods found in a resisting ship ; that it was admitted both by the counsel for the claimant and by the Court, in that case, that the distinction between an enemy convoy and a neutral convoy was unfavourable to the former, inasmuch as the enemy convoy stamped a *primary* character of hostility on all the vessels sailing under its protection, which presumption the counsel seemed to think might be rebutted, but which Sir William Scott considered to be a *conclusive* presumption ; and that the distinction between hostile and neutral convoy, favourable to the latter, was, that where the conveying force was neutral, the captors must show an *actual* resistance, which in the case of the *Maria* was shown (among other things) by the instructions of the Swedish government, authorizing such resistance, which were relied upon, not as constituting a part of the offence, but as rendering it probable that there was actual resistance, whilst in the case of the *Nereide*, the *intention* to resist, (independent of the fact,) was rendered certain by the general hostile character of the force employed. I regret that I have not the means of restoring this part of the argument, which I understand was of great force and beauty : but it is irrecoverably lost. In the case of the *Maria*, the counsel for the claimant, in contending that the

presumption arising from a *hostile* convoy was not conclusive against the ships and cargoes sailing under its protection, cited the case of the *Sampson, Barney*, before the Lords of Appeal, an asserted American ship taken under French convoy, and communicating with the French ships by signal for battle, which they said the Lords had sent to farther proof to ascertain whether *there had been an actual resistance*. To which intimation Sir W. Scott observed: "I do not admit the authority of that case to the extent to which you push it. That question is still reserved, although the Lords might wish to know as much of the facts as possible." And I may be excused for adding, that Mr. Justice Story, in his judgment in the case of the *Nereide*, states that the sentence of condemnation in the *Sampson, Barney*, was subsequently affirmed by the Lords.*]

* * * * *

The case of the *Catharina Elizabeth* (Rob. Adm. Rep. vol. 5, p. 232) has also been produced against us. It would seem, indeed, that my learned friend entertains some doubts of its applicability to that of the *Nereide*, since he rather invites our attention to the brief marginal summary of the reporter than to the case. The marginal note says: "*Resistance by an enemy master will not affect the cargo, being the property of a neutral merchant:*" and my learned friend, taking or rather mistaking this for a universal position.

* Cranch's Reports, vol. ix, p. 442. Note.

is so well satisfied with it that he desires to look no farther, and would have us trouble ourselves as little as possible with the reasoning of the Court and the particular circumstances of the transaction, by which the Reporter (certainly a very excellent and able man) took for granted that his note would be qualified. Dr. Robinson meant only to say that the resistance of the enemy master, *on that occasion*, did not affect the neutral cargo; presuming that the reader of his note would read the judgment to which it belonged, and in which he could not fail to find the nature of that occasion. This is what I have done, and what I trust your Honours will do. “*Territus insisto prioris margine ripæ*,”* may come with a good grace from the learned counsel whose interest it is to take refuge there from the doctrine of the case itself; but it does not suit me. I shall on the contrary pass to the case from the margin.

Now what is that case? An *enemy master* endeavours to *recover his captured property*, or rather (as appears to have been the fact) to *take the captured vessel*; and Sir William Scott informs us that there is no harm in this, as regards the enemy master himself, and that it is quite clear that it cannot affect the neutral owner of the cargo. As to the enemy master, the quotation from Terence (“*Lupum auribus teneo*,”) explains the whole matter. If I capture an enemy I must

* *Territaque insisto prioris margine ripæ.*

OVID, Lib. v., Fab. ix, l. 597.

take care to hold him. He is not bound (unless under parole) to acquiesce; and if when opportunity offers he tries to withdraw himself and his property, or even to capture the captors, he does just what might be expected and what he has a right to do. He violates no duty, and infringes no obligation. I admit all this to be perfectly true; and I am ready to admit, if it will be of any service to the claimant, that the captain of the *Nereide* had a right, not only to *resist* the Governor Tompkins, but to *capture* her if he could. What I object against the claimant is, not that the *captain of the Nereide* resisted unlawfully, with a view to his own rights, but that the *claimant* whose property was liable to unresisted visitation and search, and whose rights and obligations were very different from those of the captain of the *Nereide*, had identified himself with him, and was a party to that resistance, inasmuch as he was the hirer of the force with which it was made, knowing its hostile character, and had associated it upon the ocean with his property, aware of the hostile control to which it was subject. For a force, thus qualified, and so employed by a neutral, I say that he is responsible upon the plainest grounds of law and reason, if it be used (as from its nature it must be) in a way in which *he* is not authorized to use it. I say, further, that a neutral cannot *at all* employ such a force, placed under such hostile control, without guilt; and that he incurs the confiscation of his goods if they are found connect-

ed with it, although there be no resistance on account of its being hopeless. I say, further, that if a neutral will have resort to force, it must at his peril be such as is not from its character hurtful to the opposite belligerent, or inconsistent with a peaceable compliance on his part with all his neutral duties. And, surely, there is nothing in the case of the *Catharina Elizabeth* which says otherwise.

Another case in the same collection (vol. 3, p. 278. The Despatch) tells us that if a *neutral* master endeavours to rescue or recover by force the captured property, it shall be condemned, because the captor is not bound as against a neutral to keep military possession of the thing captured, or justified in holding the neutral master and crew as prisoners. On the contrary, he is to rely upon the duty of the neutral to submit, and hope for restitution and compensation from a court of prize; and if this duty be violated by the neutral master and crew, confiscation is the result. This is explanatory of the judgment in the case of the *Catharina Elizabeth*, and is there used by Sir William Scott for that purpose. It shows, as the facts of the case also show, that the Court intended to confine its decision in the *Catharina Elizabeth* to the case of an enemy master *already captured*, for whom, as he is in the custody of the captor (whose business it is, not to trust, but to guard and keep him) the neutral shipper is no longer answerable. That the enemy master ceases the moment he becomes a prisoner, and his vessel

prize, to be for any purpose, the agent, or in any sense the associate of the neutral owner of the cargo, and that their connexion is utterly dissolved by the seizure, is perfectly clear. It would, therefore, be monstrous to fasten upon the neutral owner of the goods a continuing suretyship for the peaceful conduct of the enemy master, after he has passed into the state of a prisoner of war.

But in the consideration of the case of the *Catharina Elizabeth*, it must in an especial manner be borne in mind, that the French vessel was not armed at all, and of course not by or for the owner of the cargo; that she did not resist visitation, search, or seizure; that the single circumstance upon which condemnation of the American cargo was urged, was some hostile attempt of the enemy master after capture consummated—which attempt was really and constructively his own *personal* act, not procured, or facilitated, or influenced, directly or indirectly, remotely or immediately, by the owner of the cargo, to whom in law he had become a stranger. Who is it that can persuade himself that there is any resemblance between that case and the present, or that, if in that case there was supposed to be an *arguable* reason (if I may be allowed that expression) for visiting upon the neutral shipper the hostile conduct of the enemy master, the same tribunal would in our case have hesitated to condemn?

Observe the contrast between the two cases.

In our case, at the epoch of the resistance, the

relation was subsisting in its full extent between him who made that resistance; and him who provides the means without providing any check upon the use of those means; in the other case, it was extinguished. In our case, the force employed was the original force, hired by the owner of the cargo, and left by him to the direction of a hostile agent, who used it, as he could not but be sure he would, hostilely;—in the other case, there was no original force; and that which was used was the personal force of the enemy master, and not that of the vessel. In our case, the force was exerted in direct opposition to the neutral's obligation of submission with reference to the cargo; and in the other, the neutral had already submitted, and his goods were in the quiet possession of the captors. In our case, a general capacity, legal and actual, of annoyance, as well as of resistance, had been given, by or for the neutral, to the vessel as a belligerent vessel, (a capacity which she preserved during her voyage,) for which alone, independently of *resistance in fact*, the neutral is, as I confidently contend, liable to the penalty of confiscation; in the other, the vessel was an ordinary, unarmed commercial vehicle, which the neutral might hire and employ with perfect innocence and safety.

* * * * *

The little strength with which I set out is at last exhausted, and I must hasten to a conclusion. I commit to you, therefore, without further discussion, the cause of my clients, identified with the

rights of the American people, and with those wholesome rules which give to public law simplicity and system, and tend to the quiet of the world.

We are now, thank God, once more at peace. Our belligerent rights may therefore sleep for a season. May their repose be long and profound! But the time must arrive when the interests and honour of this great nation will command them to awake, and when it does arrive, I feel undoubting confidence that they will rise from their slumber in the fulness of their strength and majesty, unenfeebled and unimpaired by the judgment of this high Court.

The skill and valour of our infant navy, which has illuminated every sea, and dazzled the master states of Europe by the splendour of its triumphs, have given us a pledge, which I trust will continue to be dear to every American heart, and influence the future course of our policy, that the ocean is destined to acknowledge the youthful dominion of the West. I am not likely to live to see it, and, therefore, the more do I seize upon the enjoyment presented by the glorious anticipation—That this dominion, when God shall suffer us to wrest it from those who have abused it, will be exercised with such justice and moderation as will put to shame the maritime tyranny of recent times, and fix upon our power the affections of mankind, it is the duty of us all to hope; but it is equally our duty to hope that we shall not be so inordinately just to others as to be unjust to ourselves.

N^o. V.SPEECH IN THE HOUSE OF REPRESENTATIVES ON THE
TREATY-MAKING POWER.

[In the debate upon the bill to carry into effect the British convention of 1815, Mr. Pinkney said,] he intended yesterday, if the state of his health had permitted, to have trespassed on the House with a short sketch of the grounds upon which he disapproved of the bill. What I could not do then, [said he,] I am about to endeavour now, under the pressure, nevertheless, of continuing indisposition, as well as under the influence of a natural reluctance thus to manifest an apparently ambitious and improvident hurry to lay aside the character of a listener to the wisdom of others, by which I could not fail to profit, for that of an expounder of my own humble notions, which are not likely to be profitable to any body. It is, indeed, but too probable that I should best have consulted both delicacy and discretion, if I had forborne this precipitate attempt to launch my little bark upon what an honourable member has aptly termed 'the torrent of debate' which this bill has produced. I am conscious that it may

with singular propriety be said of me, that I am *novus hospes* here ; that I have scarcely begun to acquire a domicil among those whom I am undertaking to address ; and that recently transplanted hither from courts of judicature, I ought for a season to look upon myself as a sort of exotic, which time has not sufficiently familiarized with the soil to which it has been removed, to enable it to put forth either fruit or flower. However all this may be, it is now too late to be silent. I proceed, therefore, to entreat your indulgent attention to the few words with which I have to trouble you upon the subject under deliberation.

That subject has already been treated with an admirable force and perspicuity on all sides of the House. The strong power of argument has drawn aside, as it ought to do, the veil which is supposed to belong to it, and which some of us seem unwilling to disturb ; and the stronger power of genius, from a higher region than that of argument, has thrown upon it all the light with which it is the prerogative of genius to invest and illustrate every thing. It is fit that it should be so ; for the subject is worthy by its dignity and importance to employ in the discussion of it all the powers of the mind, and all the eloquence by which I have already felt that this assembly is distinguished. The subject is the fundamental law. We owe it to the people to labour with sincerity and diligence, to ascertain the true construction of that law, which is but a record of

their will. We owe it to the obligations of the oath which has recently been imprinted upon our consciences, as well as to the people, to be obedient to that will when we have succeeded in ascertaining it. I shall give you my opinion upon this matter, with the utmost deference for the judgment of others ; but at the same time with that honest and unreserved freedom which becomes this place, and is suited to my habits.

Before we can be in a situation to decide whether this bill ought to pass, we must know precisely what it is ; what it is not is obvious. It is not a bill which is auxiliary to the treaty. It does not deal with details which the treaty does not bear in its own bosom. It contains no subsidiary enactments, no dependent provisions, flowing as corollaries from the treaty. It is not to raise money, or to make appropriations, or to do any thing else beyond or out of the treaty. It acts simply as the echo of the treaty.

Ingeminat voces, auditaque verba reportat. It may properly be called the twin brother of the treaty ; its duplicate, its reflected image, for it reenacts with a timid fidelity, somewhat inconsistent with the boldness of its pretensions, all that the treaty stipulates, and having performed that work of supererogation, stops. It once attempted something more, indeed ; but that surplus has been expunged from it as a desperate intruder, as something which might violate, by a misinterpretation of the treaty, that very public faith which we

are now prepared to say the treaty has never plighted in any the smallest degree. In a word, the bill is a *fac-simile* of the treaty in all its clauses.

I am warranted in concluding, then, that if it be any thing but an empty form of words, it is a *confirmation* or *ratification* of the treaty; or, to speak with a more guarded accuracy, is an act to which only (if passed into law) the treaty can owe its being. If it does not spring from the *pruritas leges ferendi*, by which this body can never be afflicted, I am warranted in saying, that it springs from an hypothesis (which may afflict us with a worse disease) that no treaty of commerce can be made by any power in the state but Congress. It stands upon that postulate, or it is a mere bubble, which might be suffered to float through the forms of legislation, and then to burst without consequence or notice.

That this postulate is utterly irreconcilable with the claims and port with which this convention comes before you, it is impossible to deny. Look at it! Has it the air or shape of a mere pledge that the President will recommend to Congress the passage of such laws as will produce the effect at which it aims? Does it profess to be preliminary, or provisional, or inchoate, or to rely upon your instrumentality in the consummation of it, or to take any notice of you, however distant, as actual or eventual parties to it? No, it pretends upon the face of it, and in the solemnities with which it has been accompanied and

followed, to be a pact with a foreign state, complete and self-efficient, from the obligation of which this government cannot now escape, and to the perfection of which no more is necessary than has already been done. It contains the clause which is found in the treaty of 1794, and substantially in every other treaty made by the United States under the present constitution, so as to become a formula, that, when ratified by the President of the United States, by and with the advice and consent of the Senate, and by his Britannic majesty, and the respective ratifications mutually exchanged, it shall be binding and obligatory on the said states and his majesty.

It has been ratified in conformity with that clause. Its ratifications have been exchanged in the established and stipulated mode. It has been proclaimed, as other treaties have been proclaimed, by the executive government, as an integral portion of the law of the land, and our citizens at home and abroad, have been admonished to keep and observe it accordingly. It has been sent to the other contracting party with the last stamp of the national faith upon it, after the manner of former treaties with the same power, and will have been received and acted upon by that party as a concluded contract, long before your loitering legislation can overtake it. I protest, Sir, I am somewhat at a loss to understand what this convention has been since its ratifications were exchanged, and what it is now, if our bill be sound

in its principle. Has it not been, and is it not an unintelligible, unbaptized and unbaptizable thing, without attributes of any kind, bearing the semblance of an executed compact, but in reality a hollow fiction ; a thing which no man is led to consider even as the germ of a treaty, entitled to be cherished in the vineyard of the constitution ; a thing which, professing to have done every thing that public honour demands, has done nothing but practise delusion ? You may ransack every diplomatic nomenclature, and run through every vocabulary, whether of diplomacy or law, and you shall not find a word by which you may distinguish, if our bill be correct in its hypothesis, this ' deed without a name.' A plain man who is not used to manage his phrases, may, therefore, presume to say that if this convention with England be not a valid treaty, which does not stand in need of your assistance, it is an usurpation on the part of those who have undertaken to make it ; that if it be not an act within the treaty-making capacity, confided to the President and Senate, it is an encroachment on the legislative rights of Congress.

I am one of those who view the bill upon the table, as declaring that it is not within that capacity, as looking down upon the convention as the still-born progeny of arrogated power, as offering to it the paternity of Congress, and affecting by that paternity to give to it life and strength ; and as I think that the convention does not stand in

need of any such filiation, to make it either strong or legitimate, that it is already all that it can become, and that useless legislation upon such a subject is vicious legislation, I shall vote against the bill. The correctness of these opinions is what I propose to establish.

I lay it down as an incontrovertible truth, that the constitution has assumed (and, indeed, how could it do otherwise ?) that the government of the United States might and would have occasion, like the other governments of the civilized world, to enter into treaties with foreign powers, upon the various subjects involved in their mutual relations ; and further, that it might be, and was proper to designate the department of the government in which the capacity to make such treaties should be lodged. It has said, accordingly, that the President, with the concurrence of the Senate, shall possess this portion of the national sovereignty. It has, furthermore, given to the same magistrate, with the same concurrence, the exclusive creation and control of the whole machinery of diplomacy. He only, with the approbation of the Senate, can appoint a negociator, or take any step towards negotiation. The constitution does not, in any part of it, even intimate that any other department shall possess either a constant or an occasional right to interpose in the preparation of any treaty, or in the final perfection of it. The President and Senate are explicitly pointed out as the sole actors in that sort of transaction. The

proscribed concurrence of the *Senate*, and that too by a majority greater than the ordinary legislative majority, plainly excludes the necessity of congressional concurrence. If the consent of Congress to any treaty had been intended, the constitution would not have been guilty of the absurdity of first putting a treaty for ratification to the President and Senate exclusively, and again to the same President and Senate as portions of the legislature. It would have submitted the whole matter at once to Congress, and the more especially, as the ratification of a treaty by the Senate, as a branch of the legislature, may be by a smaller number than a ratification of it by the same body, as a branch of the executive government. If the ratification of any treaty by the President, with the advice and consent of the Senate, must be followed by a legislative ratification, it is a mere nonentity. It is good for all purposes, or for none. And if it be nothing in effect, it is a mockery by which nobody would be bound. The President and Senate would not themselves be bound by it—and the ratification would at last depend, not upon the will of the President and two-thirds of the Senate, but upon the will of a bare majority of the two branches of the legislature, subject to the qualified legislative control of the President.

Upon the power of the President and Senate, therefore, there can be no doubt. The only question is as to the extent of it, or in other words, as to the subject upon which it may be exerted.

The *effect* of the power, when exerted within its lawful sphere, is beyond the reach of controversy. The constitution has declared, that whatsoever amounts to a treaty, made under the authority of the United States, shall immediately be supreme law. It has contradistinguished a *treaty* as law from *an act of Congress* as law. It has erected treaties, so contradistinguished, into a binding judicial rule. It has given them to our courts of justice, in defining their jurisdiction, as a portion of the *lex terræ*, which they are to interpret and enforce. In a word, it has communicated to them, if ratified by the department which it has specially provided for the making of them, the rank of law, or it has spoken without meaning. And if it has elevated them to that rank, it is idle to attempt to raise them to it by ordinary legislation.

Upon the extent of the power, or the subjects upon which it may act, there is as little room for controversy. The power is to make *treaties*. The word treaties is *nomen generalissimum*, and will comprehend *commercial* treaties, unless there be a limit upon it by which they are excluded. It is the *appellative*, which will take in the whole species, if there be nothing to narrow its scope. There is no such limit. There is not a syllable in the context of the clause to restrict the natural import of its phraseology. The power is left to the force of the generic term, and is, therefore, as wide as a treaty-making power can be. It embraces all the varieties of treaties which it could

be supposed this government could find it necessary or proper to make, or it embraces none. It covers the whole treaty-making ground which this government could be expected to occupy, or not an inch of it.

It is a just presumption, that it was designed to be co-extensive with all the exigencies of our affairs. Usage sanctions that presumption—expediency does the same. The omission of any exception to the power, the omission of the designation of a mode by which a treaty, not intended to be included within it, might otherwise be made, confirms it. That a commercial treaty was, above all others, in the contemplation of the constitution, is manifest. The immemorial practice of Europe, and particularly of the nation from which we emigrated, the consonance of enlightened theory to that practice, prove it. It may be said, indeed, that at the epoch of the birth of our constitution, the necessity for a power to make commercial treaties was scarcely visible, for that our trade was then in its infancy. It was so ; but it was the infancy of another Hercules, promising, not indeed a victory over the lion of Nemæa, or the boar of Erymanthus, but the peaceful conquest of every sea which could be subjected to the dominion of commercial enterprise. It was then as apparent as it is now, that the destinies of this great nation were irrevocably commercial ; that the ocean would be whitened by our sails, and the *ultima Thule* of the world compelled to witness the more than Phœnician spirit

and intelligence of our merchants. With this glorious anticipation dawning upon them—with this resplendent Aurora gilding the prospect of the future; nay, with the risen orb of trade illuminating the vast horizon of American greatness, it cannot be supposed that the framers of the constitution did not look to the time when we should be called upon to make commercial conventions. It needs not the aid of the imagination to reject this disparaging and monstrous supposition. Dullness itself, throwing aside the lethargy of its character, and rising for a passing moment to the rapture of enthusiasm, will disclaim it with indignation.

It is said, however, that the constitution has given to Congress the power to regulate commerce with foreign nations; and that, since it would be inconsistent with that power, that the President, with the consent of the Senate, should do the same thing, it follows, that this power of Congress is an exception out of the treaty-making power. Never were premises, as it appears to my understanding, less suited to the conclusion. The power of Congress to regulate our foreign trade, is a power of municipal legislation, and was designed to operate as far as, upon such a subject, municipal legislation can reach. Without such a power, the government would be wholly inadequate to the ends for which it was instituted. A power to regulate commerce by treaty alone, would touch only a portion of the

subject. A wider and more general power was therefore indispensable, and it was properly devolved on Congress, as the legislature of the Union.

On the other hand, a power of mere municipal legislation, acting upon views exclusively our own, having no reference to a reciprocation of advantages by arrangements with a foreign state, would also fall short of the ends of government in a country of which the commercial relations are complex and extensive, and liable to be embarrassed by conflicts between its own interests and those of other nations. That the power of Congress is simply legislative in the strictest sense, and calculated for ordinary domestic regulation only, is plain from the language in which it is communicated. There is nothing in that language which indicates regulation, by compact or compromise, nothing which points to the co-operation of a foreign power, nothing which designates a treaty-making faculty. It is not connected with any of the necessary accompaniments of that faculty; it is not furnished with any of those means, without which it is impossible to make the smallest progress towards a treaty.

It is self-evident, that a capacity to regulate commerce by treaty, was intended by the constitution to be lodged somewhere. It is just as evident, that the legislative capacity of Congress does not amount to it; and cannot be exerted to produce a treaty. It can produce only a statute, with which a foreign state cannot be made to concur,

and which will not yield to any modifications which a foreign state may desire to impress upon it for suitable equivalents. There is no way in which Congress, as such, can mould its laws into treaties, if it respects the constitution. It may legislate and counter-legislate ; but it must for ever be beyond its capacity to combine in a law, emanating from its separate domestic authority, its own views with those of other governments, and to produce a harmonious reconciliation of those jarring purposes and discordant elements which it is the business of negotiation to adjust.

I reason thus, then, upon this part of the subject. It is clear that the power of Congress, as to foreign commerce, is only what it professes to be in the constitution, a legislative power, to be exerted municipally without consultation or agreement with those with whom we have an intercourse of trade ; it is undeniable that the constitution meant to provide for the exercise of another power relatively to commerce, which should exert itself in concert with the analogous power in other countries, and should bring about its results, not by statute enacted by itself, but by an international compact called a treaty ; that it is manifest, that this other power is vested by the constitution in the President and Senate, the only department of the government which it authorises to make any treaty, and which it enables to make all treaties ; that if it be so vested, its regular exercise must result in that which, as far as it reaches, is law in itself,

and consequently repeals such municipal regulations as stand in its way, since it is expressly declared by the constitution that treaties regularly made shall have, as they ought to have, the force of law. In all this, I perceive nothing to perplex or alarm us. It exhibits a well digested and uniform plan of government, worthy of the excellent men by whom it was formed. The ordinary power to regulate commerce by statutory enactments, could only be devolved upon Congress, possessing all the other legislative powers of the government. The extraordinary power to regulate it by treaty, could not be devolved upon Congress, because from its composition, and the absence of all those authorities and functions which are essential to the activity and effect of a treaty-making power, it was not calculated to be the depository of it. It was wise and consistent to place the extraordinary power to regulate commerce by treaty, where the residue of the treaty-making power was placed, where only the means of negotiation could be found, and the skilful and beneficial use of them could reasonably be expected.

That Congress legislates upon commerce, *subject to the treaty-making power*, is a position perfectly intelligible; but the understanding is in some degree confounded by the other proposition, that the legislative power of Congress is an exception out of the treaty-making power. It introduces into the constitution a strange anomaly—a commercial state, with a written constitution, and

no power in it to regulate its trade, in conjunction with other states, in the universal mode of convention. It will be in vain to urge, that this anomaly is merely imaginary; for that the President and Senate may make a treaty of commerce for the consideration of Congress. The answer is, that the treaties which the President and Senate are entitled to make, are such, as when made, become law; that it is no part of their functions simply to initiate treaties, but conclusively to make them; and that where they have no power to make them, there is no provision in the constitution, how or by whom they shall be made.

That there is nothing new in the idea of a separation of the legislative and conventional powers upon commercial subjects, and of the necessary control of the former by the latter, is known to all who are acquainted with the constitution of England. The Parliament of that country enacts the statutes by which its trade is regulated municipally. The Crown modifies them by a treaty. It has been imagined, indeed, that the Parliament is in the practice of confirming such treaties; but the fact is undoubtedly otherwise. Commercial treaties are laid before Parliament, because the king's ministers are responsible for their advice in the making of them, and because the vast range and complication of the English laws of trade and revenue, render legislation unavoidable, not for the ratification, but the execution of their commercial treaties.

It is suggested again, that the treaty-making power (unless we are tenants in common of it with the President and Senate, to the extent at least of our legislative rights) is a pestilent monster, pregnant with all sorts of disasters!—It teems with ‘Gorgons, and Hydras, and Chimeras dire!’ At any rate, I may take for granted that the case before us does not justify this array of metaphor and fable; since we are all agreed that the convention with England is not only harmless but salutary. To put this particular case, however, out of the argument, what have we to do with considerations like these? are we here to form, or to submit to the constitution as it has been given to us for a rule by those who are our masters? Can we take upon ourselves the office of political casuists, and because we think that a power ought to be less than it is, compel it to shrink to our standard? Are we to bow with reverence before the national will as the constitution displays it, or to fashion it to our own, to quarrel with that charter, without which we ourselves are nothing; or to take it as a guide which we cannot desert with innocence or safety? But why is the treaty-making power lodged, as I contend it is, in the President and Senate, likely to disaster us, as we are required to apprehend it will? Sufficient checks have not, as it seems, been provided, either by the constitution or the nature of things, to prevent the abuse of it. It is in the House of Representatives alone, that the amulet, which bids

defiance to the approaches of political disease, or cures it when it has commenced, can in all vicissitudes be found. I hold that the checks are sufficient, without the charm of our legislative agency, for all those occasions which wisdom is bound to foresee and to guard against; and that as to the rest (the eccentricities and portents which no ordinary checks can deal with) the occasions must provide for themselves.

It is natural, here, to ask of gentlemen, what security they would have? They cannot 'take a bond of Fate;' and they have every pledge which is short of it. Have they not, as respects the President, all the security upon which they rely from day to day for the discreet and upright discharge of the whole of his other duties, many and various as they are? What security have they that he will not appoint to office the refuse of the world; that he will not pollute the sanctuary of justice by calling vagabonds to its holy ministry, instead of adorning it with men like those who now give to the bench more dignity than they receive from it: that he will not enter into a treaty of amnesty with every conspirator against law and order, and pardon culprits from mere enmity to virtue? The security for all this, and infinitely more, is found in the constitution and in the order of nature; and we are all satisfied with it. One should think that the same security, which thus far time has not discredited, might be sufficient

to tranquillize us upon the score of the power which we are now considering.

We talk of ourselves as if we only were the representatives of the people. But the first magistrate of this country is also the representative of the people, the creature of their sovereignty, the administrator of their power, their steward and servant, as you are—he comes from the people, is lifted by them into place and authority, and after a short season returns to them for censure or applause. There is no analogy between such a magistrate and the hereditary monarchs of Europe. He is not born to the inheritance of office; he cannot even be elected until he has reached an age at which he must pass for what he is; until his habits have been formed, his integrity tried, his capacity ascertained, his character discussed and probed for a series of years, by a press, which knows none of the restraints of European policy. He acts, as you do, in the full view of his constituents, and under the consciousness that on account of the singleness of his station, all eyes are upon him. He knows, too, as well as you can know, the temper and intelligence of those for whom he acts, and to whom he is amenable. He cannot hope that they will be blind to the vices of his administration on subjects of high concernment and vital interest; and in proportion as he acts upon his own responsibility, unrelieved and undiluted by the infusion of ours, is the danger

of ill-advised conduct likely to be present to his mind.

Of all the powers which have been entrusted to him, there is none to which the temptations to abuse belong so little as to the treaty-making power in all its branches ; none which can boast such mighty safeguards in the feelings, and views, and passions which even a misanthrope could attribute to the foremost citizen of this republic—He can have no motive to palsy by a commercial or any other treaty the prosperity of his country. Setting apart the restraints of honour and patriotism, which are characteristic of public men in a nation habitually free, could he do so without subjecting himself as a member of the community (to say nothing of his immediate connections) to the evils of his own work ? A commercial treaty, too, is always a conspicuous measure. It speaks for itself. It cannot take the garb of hypocrisy, and shelter itself from the scrutiny of a vigilant and well instructed population. If it be bad, it will be condemned, and if dishonestly made, be execrated. The pride of country, moreover, which animates even the lowest of mankind, is here a peculiar pledge for the provident and wholesome exercise of power. There is not a consideration by which a cord in the human breast can be made to vibrate that is not in this case the ally of duty. Every hope either lofty or humble that springs forward to the future ; even the vanity which looks not beyond the moment ; the dread of shame and

the love of glory ; the instinct of ambition ; the domestic affections ; the cold ponderings of prudence ; and the ardent instigations of sentiment and passion, are all on the side of duty. It is in the exercise of this power that responsibility to public opinion, which even despotism feels and truckles to, is of gigantic force. If it were possible, as I am sure it is not, that an American citizen, raised, upon the credit of a long life of virtue, to a station so full of honour, could feel a disposition to mingle the little interests of a perverted ambition with the great concerns of his country, as embraced by a commercial treaty, and to sacrifice her happiness and power by the stipulations of that treaty, to flatter or aggrandize a foreign state, he would still be saved from the perdition of such a course, not only by constitutional checks, but by the irresistible efficacy of responsibility to public opinion, in a nation whose public opinion wears no mask, and will not be silenced. He would remember that his political career is but the thing of an hour, and that when it has passed he must descend to the private station from which he rose, the object either of love and veneration, or of scorn and horror. If we cast a glance at England, we shall not fail to see the influence of public opinion upon an hereditary king, an hereditary nobility, and a House of Commons elected in a great degree by rotten boroughs and overflowing with placemen. And if this influence is potent there against all the efforts of independent

power and wide spread corruption, it must in this country be omnipotent.

But the treaty-making power of the President is further checked by the necessity of the concurrence of two-thirds of the Senate, consisting of men selected by the legislatures of the States, themselves elected by the people. They too must have passed through the probation of time before they can be chosen, and must bring with them every title to confidence. The duration of their office is that of a few years ; their numbers are considerable ; their constitutional responsibility as great as it can be ; and their moral responsibility beyond all calculation.

The power of impeachment has been mentioned as a check upon the President in the exercise of the treaty-making capacity. I rely upon it less than upon others, of, as I think, a better class ; but as the constitution places some reliance upon it, so do I. It has been said, that impeachment has been tried and found wanting. Two impeachments have failed, as I have understood, (that of a judge was one)—but they may have failed for reasons consistent with the general efficacy of such a proceeding. I know nothing of their merits, but I am justified in supposing that the evidence was defective, or that the parties were innocent as they were pronounced to be :—Of this, however, I feel assured, that if it should ever happen that the President is found to deserve the punishment which impeachment seeks to inflict, (even for making a

treaty to which the judges have become parties,) and this body should accuse him in a constitutional way, he will not easily escape. But, be that as it may, I ask if it is nothing that you have power to arraign him as a culprit? Is it nothing that you can bring him to the bar, expose his misconduct to the world, and bring down the indignation of the public upon him and those who dare to acquit him?

If there be any power explicitly granted by the constitution to Congress, it is that of declaring war; and if there be any exercise of human legislation more solemn and important than another, it is a declaration of war. For expansion it is the largest, for effect the most awful of all the enactments to which Congress is competent; and it always is, or ought to be, preceded by grave and anxious deliberation. This power, too, is connected with, or virtually involves, others of high import and efficacy; among which may be ranked the power of granting letters of marque and reprisal, of regulating captures, of prohibiting intercourse with, or the acceptance of protections or licenses from, the enemy. Yet farther; a power to declare war implies, with peculiar emphasis, a negative upon all power, in any other branch of the government, inconsistent with the full and continuing effect of it. A power to make peace in any other branch of the government, is utterly inconsistent with that full and continuing effect. It may even prevent it from having any

effect at all ; since peace may follow almost immediately (although it rarely does so follow) the commencement of a war. If, therefore, it be undeniable that the President, with the advice and consent of the Senate, has power to make a treaty of peace, available *ipso jure*, it is undeniable that he has power to repeal, by the mere operation of such a treaty, the highest acts of congressional legislation. And it will not be questioned that this repealing power is, from the eminent nature of the war-declaring power, less fit to be made out by inference than the power of modifying by treaty the laws which regulate our foreign trade. Now the President, with the advice and consent of the Senate, has an incontestible and uncontested right to make a treaty of peace, of absolute inherent efficacy, and that too in virtue of the very same general provision in the constitution which the refinements of political speculation, rather than any known rules of construction, have led some of us to suppose excludes a treaty of commerce.

By what process of reasoning will you be able to extract from the wide field of that general provision the obnoxious case of a commercial treaty, without forcing along with it the case of a treaty of peace, and along with that again the case of every possible treaty ? Will you rest your distinction upon the favourite idea that a treaty cannot repeal laws competently enacted, or, as it is sometimes expressed, cannot trench upon the le-

gislative rights of Congress? Such a distinction not only seems to be reproached by all the theories, numerous as they are, to which this bill has given birth, but is against notorious fact and recent experience. We have lately witnessed the operation in this respect of a treaty of peace, and could not fail to draw from it this lesson ; that no sooner does the President exert, with the consent of the Senate, his power to make such a treaty, than your war-denouncing law, your act for letters of marque, your prohibitory statutes as to intercourse and licenses, and all the other concomitant and dependent statutes, so far as they affect the national relations with a foreign enemy, pass away as a dream, and in a moment are 'with years beyond the flood.' Your auxiliary agency was not required in the production of this effect ; and I have not heard that you even tendered it. You saw your laws departing as it were from the statute books, expelled from the strong hold of supremacy by the single force of a treaty of peace ; and you did not attempt to stay them ; you did not bid them linger until you should bid them go ; you neither put your shoulders to the wheel of expulsion nor made an effort to retard it. In a word, you did nothing. You suffered them to flee as a shadow, and you know that they were reduced to shadow, not by the necromancy of usurpation, but by the energy of constitutional power. Yet, you had every reason for interference then which you can have now. The power

to make a treaty of peace stands upon the same constitutional footing with the power to make a commercial treaty. It is given by the same words. It is exerted in the same manner. It produces the same conflict with municipal legislation. The ingenuity of man cannot urge a consideration, whether upon the letter or the spirit of the constitution, against the existence of a power in the President and Senate to make a valid commercial treaty, which will not, if it be correct and sound, drive us to the negation of the power exercised by the President and Senate, with universal approbation, to make a valid treaty of peace.

Nay, the whole treaty-making power will be blotted from the constitution, and a new one, alien to its theory and practice, be made to supplant it, if sanction and scope be given to the principles of this bill. This bill may indeed be considered as the first of many assaults, not now intended perhaps, but not therefore the less likely to happen, by which the treaty-making power, as created and lodged by the constitution, will be pushed from its place, and compelled to abide with the power of ordinary legislation. The example of this bill is beyond its ostensible limits. The pernicious principle, of which it is at once the child and the apostle, must work onward and to the right and the left until it has exhausted itself; and it never can exhaust itself until it has gathered into the vortex of the legislative powers

of Congress the whole treaty-making capacity of the government. For if, notwithstanding the directness and precision with which the constitution has marked out the department of the government by which it wills that treaties shall be made, and has declared that treaties so made shall have the force and dignity of law, the House of Representatives can insist upon some participation in that high faculty, upon the simple suggestion that they are sharers in legislative power upon the subjects embraced by any given treaty, what remains to be done, for the transfer to Congress of the entire treaty-making faculty, as it appears in the constitution, but to show that Congress have legislative power direct or indirect upon every matter which a treaty can touch? And what are the matters within the practicable range of a treaty, which your laws cannot either mould, or qualify, or influence? Imagination has been tasked for example, by which this question might be answered. It is admitted that they must be few, and we have been told, as I think, of no more than one. It is the case of *contraband of war*. This case has, it seems, the double recommendation of being what is called an international case, and a case beyond the utmost grasp of congressional legislation. I remark upon it, that it is no more an international case than any matter of collision incident to the trade of two nations with each other. I remark farther, that a treaty upon the point of contraband of war may

interfere, as well as any other treaty, with an act of Congress. A law encouraging, by a bounty or otherwise, the exportation of certain commodities, would be counteracted by an insertion into the list of contraband of war, in a treaty with England or France, any one of those commodities. The treaty would look one way, the law another. And various modes might readily be suggested in which Congress might so legislate as to lay the foundation of repugnancy between its laws and the treaties of the President and Senate with reference to contraband. I deceive myself greatly if a subject can be named upon which a like repugnancy might not occur. But even if it should be practicable to furnish, after laborious inquiry and meditation, a meagre and scanty inventory of some half dozen topics, to which domestic legislation cannot be made to extend, will it be pretended that such was the insignificant and narrow domain designed by the constitution for the treaty-making power? It would appear that there is with some gentlemen a willingness to distinguish between the legislative power expressly granted to Congress and that which is merely implied, and to admit that a treaty may control the results of the latter. I reply to those gentlemen that one legislative power is exactly equivalent to another, and that, moreover, the whole legislative power of Congress may justly be said to be expressly granted by the constitution, although the constitution does not enumerate every

variety of its exercise, or indicate all the ramifications into which it may diverge to suit the exigencies of the times. I reply, besides, that even with the qualification of this vague distinction, whatever may be its value or effect, the principle of the bill leaves no adequate sphere for the treaty-making power. I reply, finally, that the acknowledged operation of a treaty of peace in repealing laws of singular strength and unbending character, enacted in virtue of powers communicated *in terminis* to Congress, gives the distinction to the winds.

And now that I have again adverted to the example of a treaty of peace, let me call upon you to reflect on the answer which that example affords to all the warnings we have received in this debate against the mighty danger of entrusting to the only department of the government, which the constitution supposes can make a treaty, the incidental prerogative of a repealing legislation. It is inconsistent, we are desired to believe, with the genius of the constitution, and must be fatal to all that is dear to freemen, that an Executive magistrate and a Senate, who are not immediately elected by the people, should possess this authority. We hear from one quarter that if it be so, the public liberty is already in the grave; and from another, that the public interest and honour are upon the verge of it. But do you not perceive that this picture of calamity and shame is the mere figment of excited fancy, disavowed by the consti-

tution as hysterical, and erroneous in the case of a treaty of peace? Do you not see that if there be any thing in this high coloured peril, it is a treaty of peace that must realize it? Can we in this view compare with the power to make such a treaty, that of making a treaty of commerce? Are we unable to conjecture, while we are thus brooding over anticipated evils which can never happen, that the lofty character of our country (which is but another name for strength and power) may be made to droop by a mere treaty of peace; that the national pride may be humbled; the just hopes of the people blasted; their courage tamed and broken; their prosperity struck to the heart; their foreign rivals encouraged into arrogance and tutored into encroachment, by a mere treaty of peace? I confidently trust that, as this never has been so, it never will be so; but surely it is just as possible as that a treaty of commerce should ever be made to shackle the freedom of this nation, or check its march to the greatness and glory that await it. I know not, indeed, how it can seriously be thought that our liberties are in hazard from the small witchery of a treaty of commerce, and yet in none from the potent enchantments by which a treaty of peace may strive to enthrall them. I am at a loss to conceive by what form of words, by what hitherto unheard-of stipulations, a *commercial* treaty is to barter away the freedom of United America, or of any the smallest portion of it. I cannot figure

to myself the possibility that such a project can ever find its way into the head or heart of any man, or set of men, whom this nation may select as the depositories of its power ; but I am quite sure that an attempt to insert such a project in a commercial treaty, or in any other treaty, or in any other mode, could work no other effect than the destruction of those who should venture to be parties to it, no matter whether a President, Senate, or a whole Congress. Many extreme cases have been put for illustration in this debate ; and this is one of them ; and I take the occasion which it offers to mention, that to argue from extreme cases is seldom logical, and upon a question of interpretation, never so. We can only bring back the means of delusion, if we wander into the regions of fiction, and explore the wilds of bare possibility in search of rules for real life and actual ordinary cases. By arguing from the possible abuse of power against the use or existence of it, you may and must come to the conclusion, that there ought not be, and is not, any government in this country, or in the world. Disorganization and anarchy are the sole consequences that can be deduced from such reasoning. Who is it that may not abuse the power that has been confided to him? May not *we*, as well as the other branches of the government? And, if we may, does not the argument from extreme cases prove that we ought to have no power, and that we have no power? And does it not, therefore, after having served

for an instant the purposes of this bill, turn short upon and condemn its whole theory, which attributes to us, not merely the power which is our own, but inordinate power, to be gained only by wresting it from others? Our constitutional and moral security against the abuses of the power of the executive government have already been explained. I will only add, that a great and manifest abuse of the delegated authority to make treaties would create no obligation any where. If ever it should occur, as I confidently believe it never will, the evil must find its corrective in the wisdom and firmness, not of this body only, but of the whole body of the people co-operating with it. It is, after all, in the people, upon whose Atlantean shoulders our whole republican system reposes, that you must expect that recuperative power, that redeeming and regenerating spirit, by which the constitution is to be purified and redintegrated when extravagant abuse has cankered it.

In addition to the example of a treaty of peace which I have just been considering, let me put another, of which none of us can question the reality. The President may exercise the power of pardoning, save only in the case of impeachments. The power of pardoning is not communicated by words more precise or comprehensive than the power to make treaties. But to what does it amount? Is not every pardon, *pro hac vice*, a repeal of the penal law against which it gives protection? Does it not ride over the law, resist its

command, and extinguish its effect? Does it not even control the combined force of judicature and legislation? Yet, have we ever heard that your legislative rights were an exception out of the prerogative of mercy? Who has ever pretended that this faculty cannot, if regularly exerted, wrestle with the strongest of your statutes? I may be told, that the pardoning power necessarily imports a control over the penal code, if it be exercised in the form of a pardon. I answer, the power to make treaties equally imports a power to put out of the way such parts of the civil code as interfere with its operation, if that power be exerted in the form of a treaty. There is no difference in their essence. You legislate, in both cases, subject to the power. And this instance furnishes another answer, as I have already intimated, to the predictions of abuse, with which, on this occasion, it has been endeavoured to appal us. The pardoning power is in the President alone. He is not even checked by the necessity of Senatorial concurrence. He may by his single *fiat* extract the sting from your proudest enactments—and save from their vengeance a convicted offender.

Sir, you have my general notions upon the bill before you. They have no claim to novelty. I imbibed them from some of the heroes and sages who survived the storm of that contest to which America was summoned in her cradle. I imbibed them from the father of his country. My under-

standing approved them, with the full concurrence of my heart, when I was much younger than I am now ; and I feel no disposition to discard them now that age and feebleness are about to overtake me. I could say more—much more—upon this high question ; but I want health and strength. It is, perhaps, fortunate for the House that I do ; as it prevents me from fatiguing them as much as I fatigue myself.

N^o. VI.ARGUMENT ON THE RIGHT OF THE STATES TO TAX
THE NATIONAL BANK.

After the exordium,* which the reader will find in the First Part of this work, Mr. Pinkney proceeded to inquire whether the act of Congress establishing the Bank was repugnant to the Constitution. In order to determine this question, he contrasted the nature and organization of the old Confederation and the national constitution by which it had been superseded. The former was a mere federative league; nothing more than a species of alliance offensive and defensive between the States, such as there had been many examples of in the history of the world. It had no power of coercion but by arms. Its fundamental principle was a scheme of legislation for states or communities in their political capacities. This was its great and radical vice, which the new constitution was intended to reform. This last was a project of general discretionary superintendence. It was formed upon the reverse of the principle of the Confederacy. It carried its agency to the persons of the citizens: it provided for direct legislation upon the people, precisely as in the State governments. But the change intended to be produced by the new constitution consisted much less in the addition of new powers to the Union, than in the invigoration of the original powers. The power of regulating commerce was, indeed, a new power. But the powers relating to war and peace, fleets and armies, treaties and finance, with the other more considerable powers, were all

* See Part First, p. 161.

vested in Congress by the articles of confederation. The proposed change only substituted a more effectual mode of administering them.

Under the constitution, the powers belonging to the federal government, whatever may be their extent, are just as sovereign as those of the States. The State governments are not the authors and creators of the national constitution. It does not derive its powers from them. They are preceding in point of time to the national sovereignty, but are postponed to it in point of supremacy by the will of the people. The powers of the national government are the great imperial powers by which nations are known to one another. It acts upon the people as the State governments act upon them. Its powers are given by the people, as those of the State governments are given. The national constitution was framed in the name of the people, and was ratified by the people as the State constitutions were. If the respective powers of these two governments interfere, those of the States must yield.

But it is said that the powers of the national government are limited in number and extent, and that this want of universality shows that they are not sovereign powers. But the State governments are not unlimited in the number, or unrestrained in the exercise of their powers. They are limited by the declarations of rights contained in the State constitutions; by the nature and ends of all government; and by the restraints upon state legislation contained in the constitution of the United States.

It is said, too, that the powers of the State governments are original, and therefore more emphatically sovereign than those of the national government. But the State powers are no more original than those belonging to the Union. There is no original power but in the people, who are the fountain and source of all political power.

The means of giving efficacy to the sovereign authorities vested by the people in the national government, are those adapted to the end; fitted to promote, and having a natural relation and connexion with, the objects of that government. The constitution by which these authorities and the means of executing them are given, and the laws made in pursuance of it, are declared to

be the supreme law of the land. The legislatures and judges of the States are to be bound by oath to support that constitution.

Taking these leading principles along with us, the question of the constitutionality of the Bank is to be considered as a question of authority; and considered as such a question, it has been long since settled by the most revered authorities, legislative, executive, and judicial. It is not pretended that a manifest encroachment and usurpation can be sanctioned in this mode. But on a doubtful point—*vetustatis et consuetudinis maxima est*. This is such a doubtful case, that Congress may expound the nature and extent of the authority under which it acts, and this practicable interpretation become incorporated into the constitution. They did expound it by the act establishing the first Bank in 1791.

There are two distinguishing points which entitle this precedent to great respect. The first is, that it was a contemporaneous interpretation; the second is, that it was made by the authors of the constitution themselves.

The authors of the *Letters of Publius*, or the *Federalist*, (themselves the principal authors of the constitution,) in every part of their admirable commentary, assert the entire doctrine maintained by us. They assert the doctrine of implied, involved, and constructive powers; of powers implied as the necessary means of executing the principal powers granted, and as having a relation to them. They maintain this, 1st, upon general principles, and, 2dly, upon the clause in the constitution granting the power to make all laws necessary and proper to carry into effect the other powers. They maintain the necessity of making supreme, the powers of every kind granted to Congress—and that all the laws of Congress should be the supreme law of the land when made in pursuance of the constitution.

The principal members of the convention who framed the constitution, passed into the new government organized under it. The first Congress enacted the law for incorporating the Bank, after the most mature deliberation and full discussion. President Washington deliberated upon the bill with his usual caution, and before he decided, consulted his cabinet. General Hamilton, the principal author of the *Federalist*, made a report upon the subject, which after the passions and prejudices of the day have

subsided, it may be allowed to call a masterly and conclusive argument in favour of the validity of the act. Both the people and the States witnessed all this discussion, and acquiesced in the result. The President was re-elected, and no man lost his seat in Congress for his vote on this momentous question. The courts of justice executed the law, with all its penal sanctions; and in the numerous questions arising under it, no lawyer ever thought of questioning its constitutionality. There was this unanimous concurrence of the national will until the charter expired in 1811.

Political considerations alone might have produced the refusal to renew the charter at that period; at any rate, we know that they mingled themselves in the debate, and the determination. In 1815, a bill was passed in the two Houses incorporating a national Bank; to which Mr. Madison refused his assent, but upon considerations of expediency alone, waiving the question of constitutionality as having been settled by coterminous exposition, repeated subsequent recognitions, and general acquiescence for twenty years. Mr. Madison well knew what title to respect the decision in 1791 possessed. He was intimately acquainted with all the circumstances attending the formation and adoption of the constitution in which he had so large a share.

In 1816, all branches of the legislature concurred in establishing the corporation, whose chartered rights are now in judgment before the court.

Such a body of authority must be conclusive upon a doubtful and speculative question like this. It would be unfortunate if it were otherwise. The government could never acquire that stability which can alone give it strength at home and respect abroad, unless such delicate questions were considered as finally settled when thus determined. Congress is, *prima facie*, a competent judge of its own constitutional powers. It is not, indeed, as in questions of breach of privilege, the exclusive and final judge; but it must first decide, and that in a proper judicial character, upon the interpretation of the constitution, as well as the considerations of political expediency which might justify the measure. It had repeated opportunities of exercising its judgment in this respect, upon the present subject, not only in the principal acts,

incorporating the former and the present Bank, but in the various incidental statutes subsequently enacted on the same subject. On all these occasions, the question of constitutionality was equally open to debate.

There can be little danger in the Court receiving the decisions of Congress as strong, though not conclusive evidence, of the extent of its own constitutional powers. Experience has shown, what wisdom had anticipated, that its inclination is to abstain from the exercise of doubtful powers. Many of its express and unquestionable authorities it has omitted to exercise. In trespassing upon State rights, or those of the people, its responsibility is strong and direct. All its own prejudices and attachments are so many pledges of its virtue in this respect. But, surely, as to the question of *necessity*, (which relates to political economy,) the repeated decisions of Congress and the executive government are entitled to peculiar consideration, as the general question of constitutionality is mixed and complicated with the other question, whether the establishment of a Bank is a natural means of carrying into effect other powers expressly given.

The abstract question then reverts, has Congress authority to erect *any corporation*?

It has been already shown that the powers of the national government are sovereign powers for sovereign objects. These objects are generalized in the preamble to the constitution, and are afterwards more specifically enumerated. A more perfect union is to be formed; justice established; domestic tranquillity insured; the common defence provided for; the general welfare promoted; the blessings of liberty secured to the present generation and to posterity. The powers are suited to those ends. For the attainment of these vast objects, the government is armed with powers and faculties corresponding in magnitude. The means were intended to be commensurate with the ends, or the constitution was not intended to accomplish its own purposes—which is an inadmissible supposition. The security against abuse was provided by the structure of the government. All power entrusted for salutary ends, may be abused; but if the government is well constituted, the abuse cannot be permanent. The people will redress it.

To deal more in detail. The objects of the powers of the national government were,

1st. Security against foreign danger.

2d. Regulation of the intercourse, of every kind (diplomatic and commercial) with foreign nations.

3d. The maintenance of harmony, and free and friendly intercourse among the states.

4th. Certain miscellaneous objects of general utility.

5th. Restraint of the States from certain injurious acts.

6th. An express provision for giving efficacy to all these powers.

1. Security against foreign danger is one of the primitive objects of civil society, and an avowed and essential object of the Union. The powers requisite for attaining it must be effectually confided to the federal councils. They can have no other limit than the necessity of their employment, and their adaptation to promote the end. Thus the powers of making war and peace, of raising and supporting armies, and of providing and maintaining a navy, are given without stint or measure. They are indefinite, unlimited, and absolutely sovereign. So also the powers of laying and collecting taxes and duties, imposts and excises, of paying the debts of the nation, and of borrowing money on its credit, have no other limit (except as to export duties) than the objects for which they are conferred.

2. Intercourse with foreign nations is one of the most important objects of all national government, and was a principal motive for the formation of the new constitution. The power over this too is given without limit. It includes, besides the authority of regulating commerce, and forming treaties of commerce and other conventions with foreign States, that of sending and receiving ambassadors, and of defining and punishing offences against the law of nations. The States are prohibited from interfering with the exercise of those authorities.

3. For the maintenance of harmony and of friendly intercourse among the different States of the Union, are given the power of establishing uniform naturalization and bankrupt laws; to coin money; and regulate the circulating medium, and the standard of weights and measures; to regulate commerce among the States;

to establish post-offices and post-roads ; to prescribe the manner in which the records of one State shall be proved and their effect in other States.

4. The miscellaneous objects of general utility were to be attained by the power to grant patents and copy-rights ; to exercise exclusive legislation over the District of Columbia, and places purchased for the use of fortifications and dock-yards ; to declare the punishment of treason ; to admit new States into the Union ; to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the Union ; to guarantee to every State a republican form of government.

5. The provisions of restriction upon the States are, as to making treaties, and alliances with foreign states or with each other ; granting letters of marque and reprisal ; emitting bills of credit ; making any thing but gold and silver a tender ; in passing any bill of attainder, ex post facto law, or law impairing the obligation of contracts ; granting any title of nobility ; laying any duty on imports or exports ; keeping troops or ships of war, in time of peace ; engaging in war, &c.

6. The provisions for giving efficacy to all those powers, are the power to make all laws necessary and proper for carrying into execution the other powers vested in Congress, or in the government of the United States, or in any department or offices thereof ; that the constitution and the laws and treaties made in pursuance of it shall be the supreme law of the land ; that the judges in every State shall be bound thereby ; and that the members of the State legislatures and all other officers shall take an oath to support the same.

And the question is, whether a government with all these powers and faculties has authority to erect a corporation, which is a power inherent in and inseparable from all idea of sovereign power ?

There is no express prohibition in the constitution to prevent Congress from creating a corporation. It is admitted that the States possess the authority as a distinct, substantive power of sovereignty, which remains entire in them because not expressly granted to the national government. But the power of legislation in the State governments is not unlimited. There are several

limitations to it. 1st, From the nature of all government, especially of republican government, in which the residuary powers of sovereignty, not granted specifically, or by inevitable implication, are reserved to the people. 2dly, From the express limitations contained in the State constitutions : and, 3dly, From the express prohibitions to the States contained in the national constitution. Admit that the State governments have the right of establishing corporations : the question is, whence did they derive it ? It is no where expressly granted to the State legislatures in their several constitutions. It is taken by implication as a necessary means of giving effect to the general powers of legislation : but it cannot be exercised to accomplish any of the ends which are beyond the sphere of their constitutional authority. Every legislative enactment, without exception, is a mean for accomplishing some of the ends of government. Laws are not ends ; they are means for accomplishing ends. A corporation is created by a legislative act, not because the corporation is an end valuable in itself, but because it is a necessary and proper means towards the accomplishment of a valuable end. Some public convenience—some beneficial result, is aimed at by it ; and because the beneficial result is within the power of the State government, so is the establishment of the corporation. If it be inquired whence the first legislature that exercised the authority of erecting a corporation acquired that power, the answer must be from the right to accomplish that purpose or result for which the corporation is used as an instrument or means. Upon the same foundation rests the authority of Congress to create a corporation. It has not a right to create a corporation in all cases, but only in cases within the scope of its general powers of legislation—as means of executing those powers. A State government has no right to make a corporation for all purposes indiscriminately. A State government could no more make a corporation, and to effect a purpose exclusively belonging to the national government, than Congress can make a corporation to fulfil a State object. Neither can the State legislatures make a corporation to effect any object on which they are prohibited from legislating by their own constitutions or the constitution of the United States.

But why is the power of creating a corporation considered a distinct, substantive act of sovereignty, so that it cannot be taken by implication? Is it on account of its superior dignity and importance? If so, then it must necessarily belong to the national government, which is supreme within the sphere of its constitutional authority, and whose general legislative powers are of much greater magnitude than those of the States. The power of creating corporations is not an end of any government, whether supreme or subordinate, general or limited in its ordinary powers: it is one of the necessary means of accomplishing the ends of all governments. It is an authority inherent in, and incident to, all sovereignty. That it is an exertion of sovereign power, is admitted; but not more so than any other act which requires a law or a clause in a law. It is no more a distinct exercise of sovereign power than that of inflicting capital punishments.

The history of corporations will illustrate this position. They are the growth of the Roman law, and were transplanted into the common law of England and all the municipal codes of modern Europe. From England they were derived to this country. But, in the civil law, a corporation could be created by a mere voluntary association of individuals. And, in England, the authority of Parliament is not necessary to create a corporate body. The king may do it, and may communicate his prerogative power to a subject; so little is this regarded as a transcendent power of sovereignty in the British constitution. So also in our constitution, although it can only be exercised by the legislative department, it ought to be regarded as a subordinate mean to carry into effect the great ends of government.

What reason can there be why this power should not be used by the National government, as well as by the State governments, as the means of executing other powers, sovereign in their nature, if suited to that purpose? It is not now necessary to prove that it is suited to any such purpose. It may be assumed, *argumenti gratia*: and supposing it to be so, it is impossible to imagine a reason why it should not be thus used, unless it could be shown that there was something of a singular character in this power, so that no government could assume it without an express grant. If this were the nature of the power, the State governments could not exercise it without such a grant. No government can

use it otherwise than as a process towards a result. It is always an incidental and auxiliary power.

It had been said by one of the counsel on the other side, that there are no implied powers under the idea of means to an end. The constitution has defined both ends and means, and this is not enumerated among either : it is not to be taken by implication, as a mean of executing any or all of the powers expressly granted ; because other means, not more important or more sovereign in their character, are expressly enumerated. For example : one of the great ends of the Union is to provide for the common defence ; but the means of accomplishing this object, are expressly given, such as the power of laying and collecting taxes, &c.

The answer to this argument, and the example put to illustrate it, is, that those means which are expressly defined, involve other means which must be taken by implication, and thus the principal means become, with reference to those other means, ends. Many particular means are of course involved in the general means, and, in that case, the general means become the end, and the smaller objects the means. Thus : I am to gain a sum of money by going to Rome. The end is the money ; the general means, the going to Rome. But these means involve other particular means, such as providing post-horses, &c. The going to Rome now becomes the end, and the post-horses, &c. the means. But I cannot get those post-horses without borrowing money to pay for them. The post-horses are now the end, and the borrowing, the means. So that here is a regular connexion and subordination of means to ends, until the principal purpose is accomplished.

What is the use of a naked power to lay and collect taxes, if you cannot do every thing necessary to accomplish the purpose ? And if you can do all that is necessary for that purpose, you have involved powers, detailed powers, not expressed by name, but wrapped up in a general power. These are implied powers. It was impossible for the framers of the constitution to specify prospectively all the powers, necessary as means to ends, both because it would have involved an immense variety of details, and because it was impossible for them to anticipate the infinite variety of circumstances arising in such an unexampled state of

political society as ours, for ever changing and for ever improving. How unwise would it have been to attempt to legislate immutably for occasions which had not then occurred, and which could have been foreseen but dimly and imperfectly ! The constitution is a concise instrument consisting of a few pages only. The exigencies upon which it must act, are almost infinite : including all the complicated concerns of a great nation, diversified from year to year, with new circumstances, and new combinations of old circumstances, new subjects rising into existence, old disappearing.

If there be no implied powers, consider the details which must have entered into the constitution itself. It would become a vast and voluminous digest, to which some people's speeches would be as short as a single stanza compared to the ballad of the twenty thousand virgins mentioned in the Spectator. The constitution must have contained a distinct power for every clause of every act of Congress. The whole statute book of the United States is a record of implied powers, without the use of which the constitution would be a dead letter. It is filled with powers derived from implication. The power to lay and collect taxes will not execute itself. Congress must designate in detail all the means of execution, which must necessarily involve a vast variety of regulations nowhere specified in the constitution. So also the power of establishing post-offices and post-roads involves that of punishing the offence of robbing the mail. But there is no more necessary connexion between the punishment of mail robbers, and the power of establishing post-offices and post-roads, than there is between the institution of a Bank, and the collection of the revenue and payment of the public debts and expenses. And consider the absurdity of supposing that the power of taking away life may be implied, or used as a means, and yet that the creation of a corporation cannot ! So, light-houses, beacons, buoys, and public piers, have all been established under the general power to regulate commerce. But they are not indispensably necessary to commerce. It might linger on without these aids, though exposed to more perils and losses. So, Congress has express authority to coin money, and to guard the parity of the circulating medium, by providing for the punishment of counterfeiting the current coin : but laws are also made for

punishing the offence of *uttering and passing* the coin thus counterfeited. Here one of the means of accomplishing the end is expressed, and the other is implied. The law which punishes the offering of a bribe to a judge of the United States; the law which punishes the embezzling and alteration of records; the law which punishes smuggling—whence are they derived but from implication as means necessary and proper to carry into effect powers expressly granted?

Powers, as means, may then be implied in many cases. And if so, why not in this case as well as any other? The power of making all needful rules and regulations respecting the territory of the United States, is one of the specified powers of Congress. Under this power, it has never been doubted that Congress had authority to establish corporations within the territorial governments. But this power is derived entirely from implication. It is assumed as an incident to the principal power. If it may be assumed in that case upon the ground that it is a necessary means of carrying into effect the power expressly granted, why may it not be assumed in the present case upon a similar ground?

But it is said, that the end, or principal means, may be sovereign, and still Congress is not at liberty to use any subordinate means it chooses: it has not a sovereign discretion to adopt all or any means. The means or law must be an *absolutely* necessary means or law.

It is readily admitted that there must be a relation in the nature and fitness of things, between the means used and the end to be accomplished. But the question is, whether the necessity which will justify a resort to a certain mean, must be an absolute, indispensable, inevitable necessity? The power of passing all laws necessary and proper to carry into effect the other powers specifically granted, is a *political* power. It is a matter of legislative discretion, and those who are to exercise it have a wide range of choice in selecting means. In its exercise, the mind must compare different means with each other. It addresses itself to a deliberative assembly empowered to accomplish certain general objects by what it deems the most appropriate means. In the choice of these means a considerable latitude would be allowed. In accomplishing a political object, the mind is employed in a

selection of means. But absolute necessity excludes all choice. The necessity which is required, can never be the subject of mathematical demonstration. It is a question of political and moral science, in which moral certainty only can be arrived at. It is the peculiar province of a legislative assembly to judge of such questions. Congress is appointed for that purpose. It alone has the fit means of inquiry and decision. The security against abuse is to be found in the constitution and nature of the government, in its popular character and structure.

To make the validity of a law depend upon the more or less of necessity for passing it, would be absurd and ridiculous. A law would never be sure of validity. The judiciary has no means of determining by such a criterion. Even absolute necessity cannot be judged of here ; still less can practical necessity be determined in a judicial forum. The natural place for the inquiry is in the legislature, where a comparison of different means may be instituted. Not that the legislature is at liberty to adopt any and all means. It cannot adopt prohibited means. The judiciary must see that what is done is not a mere evasive pretext for usurping substantive powers not intended to be granted. For this purpose it must inquire whether the means assumed have a connexion and relation in the nature and fitness of things with the end to be accomplished. The vast variety of possible means excludes the practicability of judicial determination of the fitness and policy of a particular mean. It is sufficient that it does not appear to be violently and unnaturally forced into the service, or fraudulently assumed, in order to usurp a new substantive power of sovereignty. The criterion of absolute necessity would drive Congress to the exercise of the feeblest means only. The true rule, therefore, must be, the use of such means as are adapted to effect the object in the most advantageous manner for the general purposes of the constitution, with a discretion in Congress to judge of that question.

The doctrine of implied powers is stated by the authors of the *Federalist* in this way : " Shall the Union be constituted the guardian of the common safety ? Are fleets, and armies, and revenues, necessary to this purpose ? The government of the Union must be empowered to pass all laws, and to make all

regulations which have relation to them." No. 23. "It must, in short, possess all the means and have a right to resort to all the methods of executing the powers with which it is entrusted, that are possessed by the government of the particular States." No. 16. The subject is more fully discussed in the 44th No., where in considering the clause by which Congress has power to make all laws necessary and proper for carrying into effect the other powers granted, it is said, "Had the constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers, would have resulted to the government by unavoidable implication. No axiom is more clearly established in law, or in reason, that wherever the end is required, the means are authorized; wherever a general power to do any thing is given, every particular power necessary for doing it, is included." And yet we are told that the framers of the constitution did not understand their own work, and that this grant of means excludes all such as are not strictly and absolutely necessary. But it is certain that this clause is not restrictive. It professes to give capacity, not to take it away. It did neither the one nor the other. It was merely inserted *ex abundanti cautela*: and it now appears to have been wisely done, as the implied powers are denied to exist. It has already been shown what is the general theory it was intended to enforce. It will be as easy to show that the clause is in exact conformity with that theory.

Compare these terms as they are used in that part of the constitution now in question, with the qualified manner in which they are used in the 10th section of the same article. In the latter, it is provided that "No State shall, without the consent of Congress, lay any imposts, or duties on imports or exports, except what may be *absolutely necessary* for executing its inspection laws." In the clause in question, "Congress is invested with the power to make all laws which shall be *necessary and proper* for carrying into execution the foregoing powers," &c. There is here then, no qualification of the necessity. It need not be absolute. It may be taken in its ordinary grammatical sense. The word *necessary*, standing by itself, has no inflexible meaning; it is used in a sense more or less strict, according to the sub-

ject. This, like many other words, has a primitive sense, and another figurative and more relaxed. It may be qualified by the addition of adverbs of diminution or enlargement, such as *very*, *indispensably*, *more*, *less*, or *absolutely* necessary; which last is the sense in which it is used in the 10th section of the same article. But that it is not always used in this strict and rigorous sense, may be proved by tracing its definition and etymology in every human language.

If then all the powers of the national government are sovereign and supreme; if the power of incorporation is incidental, and involved in the others; if the degree of political necessity which will justify a resort to a particular means to carry into effect the general powers of the government, can never be a criterion of judicial determination, but must be left to legislative discretion—it only remains to inquire, whether a Bank has a natural and obvious connexion with other express or implied powers, so as to become a necessary and proper mean of carrying them into execution.

A Bank might be established as a branch of the public administration without incorporation. The government might issue paper upon the credit of the public faith pledged for its redemption, or upon the credit of its property and funds. Let the office where this paper is issued, be made a place of deposit for the money of individuals and authorize its officers to discount, and a Bank is created. It only wants the forms of incorporation. But surely it will not be pretended that clothing it with these forms would make such an establishment unconstitutional. In the Bank which is actually established and incorporated, the United States are joint stockholders and appoint joint directors; the secretary of the treasury has a supervising authority over its affairs; it is bound, upon his requisition, to transfer the funds of the government wherever they may be wanted; it performs all the duties of commissioners of the loan-office; it is bound to loan the government a certain amount on demand; its notes are receivable in payment of public debts, duties, and taxes; it is intimately connected, according to the usage of the whole world, with the power of borrowing money, and with all the financial operations of the government. It is especially connected with

the power of laying and collecting taxes. That power implies the authority, not only to impose the tax, but to prescribe in what medium it shall be paid, and to adopt measures which may produce ability to pay with promptitude. Times may exist, and have existed, when it would be impossible to collect the taxes in specie, and the national government would be compelled to receive the paper of State Banks, which Banks refused to pay specie, and were wholly irresponsible to that government. There may be many emergencies, such as insurrection, sudden war, or invasion, when the aid of a great monied corporation would be essentially necessary. The resources derived from taxation are only suited to the ordinary state of things. The government must occasionally resort to loans.

The establishment of such a corporation is also closely connected with the power to coin money, and regulate the value thereof, and of foreign coin, and to regulate foreign commerce and that between the States ; especially when it is considered that the States are prohibited from coining money, emitting bills of credit, or making any thing but gold and silver coin a tender in the payment of debts. It provides a circulating medium by which foreign commerce and that between the States may be more conveniently carried on, and exchanges facilitated. It is true, there are State Banks incorporated by which a circulating medium to a certain extent is provided. But that only diminishes the quantum of necessity. Besides, there is danger that this power of establishing local Banks may be abused. Some of the States have already created Banks with the pledge of their own public credit for the redemption of the notes issued. This seems to be within the constitutional prohibition as to bills of credit, and certainly Congress may counteract the evils of these local currencies by a national currency. It is more in the spirit of the constitution that Congress should influence the medium of commerce, the substitute of coin, than that the States should control it, who are forbidden from coining or from issuing paper money.

It is also connected with the power of making all needful regulations for the government of the territory and other property

of the United States. If they may establish a corporation to regulate their territory, they may establish one to regulate their property. Their treasure is their property, and may be invested in this mode. It is put in as a joint stock in partnership ; but not for the purpose of carrying on the trade of banking as one of the ends for which the government was established ; but only as an instrument or means for executing its sovereign political powers. This instrument could be rendered effectual for this purpose in no other way than by mixing the property of individuals with that of the public. The Bank could not otherwise acquire a credit for its notes.

But the greatest and only question of real difficulty in the cause, is that which respects the assumed right of the States to tax this Bank thus established by Congress as an instrument to give effect to the general powers of the government.

This is a question comparatively of no importance to the individual States, but of vital importance to the Union. Deny this exemption of the Bank, and what is the consequence ? There is no express provision in the constitution, which exempts any of the national institutions or property from taxation by the States. It is only by implication that the army, and navy, and treasure, and judicature of the Union, are exempt from State taxation. Yet they are practically exempt ; and they must be, or it would be in the power of any one State to destroy their use. Whatever the United States have a right to do, the individual States have no right to undo. All the sovereign powers of Congress, whether express or implied, are upon a level. Its power to establish a Bank, like its other powers, is supreme, or it would be nothing. Rising out of an exertion of paramount authority, it cannot be subject to any other power. Such a power in the States, as that now contended for, is manifestly repugnant to the power of Congress ; since a power to establish, implies a power to continue and preserve. There is a manifest repugnancy between the power of Maryland to tax, and the power of Congress to preserve, this institution. A power to build up what another may pull down at pleasure, is a power which may provoke derision, but can do nothing else.

But we are told that it is enough for the State to show its co-equal taxing power on internal objects. The equality of that power is not denied ; but it is nothing to the purpose of the argument, because this case is an exception out of it. The concurrent power of the States to tax is consistent with the power of Congress to tax the same objects. There is no repugnancy. But the exemption now insisted on is an exception by reason of evident incompatibility. It is an exception,

1. Because the tax operates upon the *legislative faculty of Congress*. It is a tax upon the charter or law. It is, or may be (in the discretion of the State) a prohibition against the exercise of legislative power.

2. Because it operates upon the public or national property, so far as it operates upon property at all.

Are there no exceptions out of the internal taxing power of the States, because the taxing power of Congress on those objects is not exclusive? All that can be said is, that the *co-equal taxing power of Congress* does not make an exception in this case. It is still a question whether any other consideration does.

If the States may lay a tax upon the Bank to the amount provided in this act of Maryland, they may lay a tax to any amount. If they may tax for revenue, they may lay a tax amounting to a prohibition under the pretext of revenue. The law now in question acts directly on the operations of the Bank, and *may* destroy it. There is no limitation or check in this respect, but in the discretion of the State legislature. That discretion cannot be controlled by the national legislature. Whenever the local councils of Maryland will it, the Bank *must* be expelled from that State. What one State can do, all can do. If one national institution may be destroyed in this manner, all may be destroyed in the same manner. A right to tax without limit or control, is essentially a power to destroy. If this power to tax the national property and institutions exists in the State of Maryland, it is unbounded in extent. There can be no check upon it, either by Congress or the people of the other States.

Is there then any intelligible, fixed, defined boundary of this taxing power? If any, it must be found in the controlling authority of this Court. If it does not exist here, it is a nonentity.

But the Court cannot say what is an abuse, and what is a legitimate use of the power. The legislative intention may be so masked, as to defy the scrutiny of the Court. How will the Court ascertain, *à priori*, that a given amount of tax will crush the Bank? It is essentially a question of political economy, and there are always a vast variety of facts bearing upon it. The facts may be mistaken. Some important considerations belonging to the subject may be kept out of sight. They must all vary with times and circumstances. The result, then, must determine whether the tax is destructive. But the Bank may linger on for some time, and that result not be known until the work of destruction is consummated. A criterion which has been proposed, is to see whether the tax has been laid impartially upon the State Banks, as well as the Bank of the United States. Even this is an unsafe test; for the State governments may wish and intend to destroy their own banks. The existence of any national institution ought not to depend upon so frail a security. But the tax now in question, is levelled exclusively at the Branch of the United States Bank, established in Maryland. There is, in point of fact, a branch of no other Bank within that State, and there can legally be no other. It is a fundamental article of the State constitution of Maryland, that taxes shall operate on all the citizens, impartially and uniformly, in proportion to their property; with the exception, however, of taxes laid *for political purposes*. This is a tax laid for a political purpose; for the purpose of destroying a great institution of the national government; and if it were not imposed for that purpose, it would be repugnant to the State constitution—as not being laid uniformly on all the citizens in proportion to their property. So that the legislature cannot disavow this to be its object, without at the same time confessing a flagrant violation of the State constitution. Compare this act with that of Kentucky, which is yet to come before the Court, and the absolute necessity of repressing such attempts in their infancy will be evident. Admit the validity of the Maryland tax, and that of the Kentucky law follows inevitably. How can it be said that the office of discount and deposit in Kentucky cannot bear a tax of sixty thousand dollars per annum, payable monthly? Probably it could not; but judicial certainty is essential; and the Court has no means of arriving at that certainty.

There is, then, here an absolute repugnancy of power to power. We are not bound to show that the particular exercise of the power in the present case, is absolutely repugnant. It is sufficient to show that the same power may be thus exercised.

Judicial proceedings are practically a subject of taxation in many countries, and in some of the States of this Union. The States are not expressly prohibited in the constitution from taxing the judicial proceedings of the United States. Yet such a prohibition must be implied, or the administration of justice in the national Courts might be obstructed by a prohibitory tax. But such a tax is no more a tax on the legislative faculty of Congress than this. The Branch Bank in Maryland is as much an institution of the sovereign power of the Union, as the Circuit Court of Maryland. One is established in virtue of an implied power ; the other by an express authority ; but both are equal and equally supreme. The Bank and its branches are no more within the jurisdiction of the States than the Courts of the Union. All the property, and all the institutions of the United States, are, constructively, without the local, territorial jurisdiction of the individual States, in every respect and for every purpose, including that of taxation. And why is it that the judicial tribunals are not within the local jurisdiction of the States ? Because it would defeat the power to establish them. Their exemption from that jurisdiction is entirely matter of construction and implication. The Courts of the Union are paramount to the power of taxation in the States, because they might be crushed by any State that quarrelled with them. The same reason applies to the case of the Bank. The immunity must extend to this case, because the power of taxation imports the power of taxation for the purpose of prohibition and destruction. The Bank is as much a national institution and an instrument of government for fiscal purposes, as the Courts are for judicial purposes. They both proceed from the supreme power, and equally claim its protection. There is the same necessity for rescuing them both from the taxing power of the States. A tax by the States would have, or might have, the same mischievous effects on either. And if a tax ever so light were to be imposed by a State upon the Courts of the Union, would it be submitted to, because it was light ? or because it was laid at the same time upon the State Courts ?

There is in all these cases extra-territoriality, so far as is necessary to give full effect to the power to which the institution owes its being. The immunity of foreign public vessels from local jurisdiction, whether State or national, was established in the case of the *Exchange*, not upon positive municipal law, nor upon the conventional law ; but it was implied from the usage of nations, and the necessity of the case. It was implied upon the same ground with the fiction which exempts a foreign sovereign, or his minister, from the local jurisdiction. If in favour of foreign governments, such an edifice of exemption has been built up, independent of the letter of the constitution, or of any other written law, shall not a similar edifice be raised on the same foundations for the security of our own national government? If a foreign ship of war, or foreign troops, coming into the territory of the country, by permission, would be exempt from the local jurisdiction, shall not the army, and navy, and fiscal institutions of the Union be equally exempt?

These analogies show that there may be exemptions from State jurisdiction which are not detailed in the constitution, but arising out of general considerations. If Congress has power to do a particular act, no State can impede, retard, or burden it. If some of the powers of Congress necessarily involve incompatibility with the taxing power of the States, this power may be incompatible. This is incompatible ; for a power to impose a tax *ad libitum* upon the notes of the Bank is a power to repeal the law by which the Bank was created. The Bank cannot be useful, it cannot act at all unless it issues notes. If the present tax does not disable the Bank from issuing its notes, another may ; and it is the authority itself which is questioned as being entirely repugnant to the power which established and preserves the Bank. Two powers thus hostile and incompatible cannot co-exist.

Though every State in the Union may impose a stamp tax, yet no State can impose a stamp tax upon the judicial proceedings, the public records, the custom-house papers of the United States. But there is no such express exception to the general taxing power of the States contained in the constitution. It stands upon plain implication. It arises from the general nature of the government, and from the principle of the supremacy of the na-

tional powers, and the laws made to execute them, over the State authorities and State laws.

It is, however, objected that the act of Congress incorporating the Bank withdraws property from taxation by the State, which would be otherwise liable to State taxation. The answer is, that it is immaterial if it does thus withdraw certain property from State taxation, if Congress had authority to establish the Bank ; since the power of Congress is supreme. But in fact, it withdraws nothing from the mass of taxable property in Maryland, which that State could tax. The whole capital of the Bank belonging to private stockholders is drawn from every State in the Union, and the stock belonging to the United States previously constituted a part of the public treasure. Neither the stock belonging to citizens of other States, nor the privileged treasure of the United States mixed up with this private property, were previously liable to taxation in Maryland ; and as to the stock belonging to its own citizens, it still continues liable to State taxation, as a portion of their individual property, in common with all the other private property in the State. The establishment of the Bank, so far from withdrawing any thing from taxation by the States, brings something into Maryland which the State may tax. The charter creates the capital stock, which is the thing taxed : and as to its dividends, so far as they belong to citizens of Maryland, they will fall within the grasp of taxation in due season when separated from the institution. But this tax has no reference to any thing but the institution.

But what if it does withdraw property from State taxation ? The materials of which the ships of war belonging to the United States are constructed were previously liable to State taxation. But the instant they are converted into public property for the public defence, they cease to be subject to State taxation. So money paid to the government of the United States in duties and taxes is withdrawn from State taxation. Here the treasure of the United States and that of individuals, citizens of Maryland and of other States, are undistinguishably confounded in the capital stock of this great national institution, which, it has been before shown, could be made useful as an instrument of finance in no other mode than by thus blending together the property of

the government and of private merchants. This partnership is, therefore, one of necessity on the part of the United States. Either this tax operates upon the franchise of the Bank, or upon its property. If upon the former, then it comes directly in conflict with the exercise of a great sovereign authority of Congress: if upon the latter, then it is a tax upon the property of the United States; since the law does not, and cannot, in imposing a stamp tax, distinguish between their property and that of individuals.

But it is said that Congress possesses and has exercised the unlimited authority of taxing the State Banks; and therefore, the States ought to have a correspondent right to tax the Bank of the United States. The answer to this objection is, that in taxing the State Banks, the States in Congress assembled, exercise their power of taxation. Congress exercises the power of the People. The whole acts on the whole. But the State tax is a part acting on the whole. Even if the two cases were precisely the same, the consequence would be rather to exempt the State Banks from federal taxation, than to subject the national Bank to taxation by a particular State. But the State Banks are not machines essential to execute the powers of the State sovereignties, and, therefore, such a consequence cannot follow. The people of the Union, and the sovereignties of the several States, have no control over the taxing power of a particular State. But they have a control over the taxing power of the United States, in the responsibility of the members of the House of Representatives to the people of the State which sends them, and of the Senators to the legislature by whom they are chosen. But there is no correspondent responsibility of the local legislature of Maryland, for example, to the people of the other States of the Union. The people of the other States are not represented in the legislature of Maryland, and can have no control, directly or indirectly, over its proceedings. The legislature of Maryland is responsible only to the people of that State. The national government can withdraw nothing from the taxing power of the States, which is not for the purpose of national benefit and the common welfare, and within its defined powers. But the local interests of the particular States are in perpetual conflict with the interests of the Union; which shows the danger of adding increased power to the

partial views and local prejudices of the States. If the tax imposed by this law be not a tax on the property of the United States, it is not a tax on any property ; and it must, consequently, be a tax on the faculty or franchise. It is then a tax on the legislative faculty of the Union, on the charter of the Bank. It imposes a stamp duty upon the notes of the Bank, and thus stops the very source of its circulation and life. It is as much a direct interference with the legislative faculty of Congress, as would be a tax on patents, or copy-rights, or custom-house papers, or judicial proceedings.



N^o. VII.

SPEECH ON THE MISSOURI QUESTION.



As I am not a very frequent speaker in this Assembly, and have shown a desire, I trust, rather to listen to the wisdom of others than to lay claim to superior knowledge by undertaking to advise, even when advice, by being seasonable in point of time, might have some chance of being profitable, you will, perhaps, bear with me if I venture to trouble you once more on that eternal subject which has lingered here, until all its natural interest is exhausted, and every topic connected with it is literally worn to tatters. I shall, I assure you, Sir, speak with laudable brevity—not merely on account of the feeble state of my health, and from some reverence for the laws of good taste which forbid me to speak otherwise, but also from a sense of justice to those who honour me with their attention. My single purpose, as I suggested yesterday, is to subject to a friendly, yet close examination, some portions of a speech, imposing certainly on account of the distinguished quarter from whence it came—not

very imposing (if I may so say, without departing from that respect which I sincerely feel and intend to manifest for eminent abilities and long experience) for any *other* reason.

I believe, Mr. President, that I am about as likely to retract an opinion which I have formed, as any member of this Body, who, being a lover of truth, inquires after it with diligence before he imagines that he has found it; but I suspect that we are all of us so constituted as that neither argument nor declamation, levelled against recorded and published decision, can easily discover a practicable avenue through which it may hope to reach either our heads or our hearts. I mention this, lest it may excite surprise, when I take the liberty to add, that the speech of the honourable gentleman from New-York, upon the great subject with which it was principally occupied, has left me as great an infidel as it found me. It is possible, indeed, that if I had had the good fortune to hear that speech at an earlier stage of this debate, when all was fresh and new, although I feel confident that the analysis which it contained of the constitution, illustrated as it was by historical anecdote rather than by reasoning, would have been just as unsatisfactory to me *then* as it is *now*, (I might not have been altogether unmoved by those warnings of approaching evil which it seemed to intimate, especially when taken in connexion with the observations of the same honourable gentleman on a preceding day, "that delays in disposing of this "subject, in the manner he desires, are dangerous, and that we "stand on slippery ground.") I must be permitted, however, (speaking only for myself,) to say, that the hour of dismay is passed. I have heard the tones of the larum bell on all sides, until they have become familiar to my ear, and have lost their power to appal, if, indeed, they ever possessed it. Notwithstanding occasional appearances of rather an unfavourable description, I have long since persuaded myself that the *Missouri Question*, as it is called, might be laid to rest, with innocence and safety, by some conciliatory compromise at least, by which, as is our duty, we might reconcile the extremes of conflicting views and feelings, without any sacrifice of constitutional principle; and in any event, that the Union would easily and triumphantly emerge from those portentous clouds with which this controversy is supposed to have environed it.

I confess to you, nevertheless, that some of the principles announced by the honourable gentleman from New-York,* with an explicitness that reflected the highest credit on his candor, did, when they were first presented, startle me not a little. They were not perhaps entirely new. Perhaps I had seen them before in some shadowy and doubtful shape,

If shape it might be called, that shape had none
Distinguishable in member, joint, or limb.

But in the honourable gentleman's speech they were shadowy and doubtful no longer. He exhibited them in forms so boldly and accurately defined -- with contours so distinctly traced -- with features so pronounced and striking, that I was unconscious for a moment that they might be old acquaintances. I received them as *novi hospites* within these walls, and gazed upon them with astonishment and alarm. I have recovered, however, thank God, from this paroxysm of terror, although not from that of astonishment. I have sought and found tranquillity and courage in my former consolatory faith. My reliance is that these principles will obtain no general currency; for, if they should, it requires no gloomy imagination to sadden the perspective of the future. My reliance is upon the unsophisticated good sense and noble spirit of the American people. I have what I may be allowed to call a proud and patriotic trust, that they will give countenance to no principles, which, if followed out to their obvious consequences, will not only shake the goodly fabric of the Union to its foundations, but reduce it to a melancholy ruin. The people of this country, if I do not wholly mistake their character, are wise as well as virtuous. They know the value of that federal association which is to them the single pledge and guarantee of power and peace. Their warm and pious affections will cling to it as to their only hope of prosperity and happiness, in defiance of pernicious abstractions, by whomsoever inculcated, or howsoever seductive and alluring in their aspect.

Sir, it is not an occasion like this, although connected, as contrary to all reasonable expectation it has been, with fearful and disorganizing theories, which would make our estimates, whether

* Mr. King.

fanciful or sound, of Natural Law, the measure of civil rights and political sovereignty in the social state, that can harm the Union. It must, indeed, be a mighty storm that can push from its moorings this sacred ark of the common safety. (It is not every trifling breeze, however it may be made to sob and howl in imitation of the tempest, by the auxiliary breath of the ambitious, the timid, or the discontented, that can drive this gallant vessel, freighted with every thing that is dear to an American bosom, upon the rocks, or lay it a sheer hulk upon the ocean.) I may perhaps mistake the flattering suggestions of hope, (the greatest of all flatterers, as we are told) for the conclusions of sober reason. Yet it is a pleasing error, if it be an error, and no man shall take it from me. I will continue to cherish the belief, in defiance of the public patronage given by the honourable gentleman from New-York, with more than his ordinary zeal and solemnity, to deadly speculations, which, invoking the name of God to aid their faculties for mischief, strike at all establishments, that the union of these States is formed to bear up against far greater shocks than, through all vicissitudes, it is ever likely to encounter (I will continue to cherish the belief, that, although like all other human institutions it may for a season be disturbed, or suffer momentary eclipse by the transit across its disk of some malignant planet, it possesses a recuperative force, a redeeming energy in the hearts of the people, that will soon restore it to its wonted calm, and give it back its accustomed splendour. On such a subject I will discard all hysterical apprehensions—I will deal in no sinister auguries—I will indulge in no hypocondriacal forebodings. I will look forward to the future with gay and cheerful hope; and will make the prospect smile, in fancy at least, until overwhelming reality shall render it no longer possible.)

I have said thus much, Sir, in order that I may be understood as meeting the constitutional question as a mere *question of interpretation*, and as disdaining to press into the service of my argument upon it prophetic fears of any sort,) however they may be countenanced by an avowal, formidable by reason of the high reputation of the individual by whom it has been hazarded, of sentiments the most destructive, which if not borrowed from,

are identical with, the worst visions of the political philosophy of France when all the elements of discord and misrule were let loose upon that devoted nation. (I mean "the infinite perfectibility of man and his institutions," and the resolution of every thing into a state of nature. I have another motive, which at the risk of being misconstrued, I will declare without reserve. With my convictions, and with my feelings, I never will consent to hold confederated America as bound together by a silken cord, which any instrument of mischief may sever, to the view of monarchical foreigners, who look with a jealous eye upon that glorious experiment which is now in progress amongst us in favour of republican freedom. Let them make such prophecies as they will, and nourish such feelings as they may: I will not contribute to the fulfilment of the former, nor minister to the gratification of the latter.)

Sir, it was but the other day that we were forbidden, (properly forbidden I am sure, for the prohibition came from you,) to assume that there existed any intention to impose a prospective restraint on the domestic legislation of Missouri—a restraint to act upon it coterminously with its origin as a State, and to continue adhesive to it through all the stages of its political existence. We are now, however, permitted to know that it is determined by a sort of political surgery to amputate one of the limbs of its local sovereignty, and thus mangled and disparaged, and thus only, to receive it into the bosom of the constitution. (It is now avowed that, while *Maine* is to be ushered into the Union with every possible demonstration of studious reverence on our part, and on hers with colours flying, and all the other graceful accompaniments of honourable triumph, this ill-conditioned upstart of the West, this obscure foundling of a wilderness that was but yesterday the hunting ground of the savage, is to find her way into the American family as she can, with an humiliating badge of remediless inferiority patched upon her garments, with the mark of recent, qualified manumission upon her, or rather with a brand upon her forehead to tell the story of her territorial vassalage, and to perpetuate the memory of her evil propensities.) It is now avowed that, while the robust District of Maine is to be seated by the side of her truly respectable

parent, co-ordinate in authority and honour, and is to be dandled into that power and dignity of which she does not stand in need, but which undoubtedly she deserves, (the more infantine and feeble Missouri is to be repelled with harshness, and forbidden to come at all, unless with the iron collar of servitude about her neck, instead of the civic crown of republican freedom upon her brows, and is to be doomed for ever to leading strings, unless she will exchange those leading strings for shackles.)

I am told that you have the power to establish this odious and revoking distinction, and I am referred for the proofs of that power to various parts of the constitution, but principally to that part of it which authorizes the admission of new States into the Union. I am myself of opinion that it is in that part only that the advocates for this restriction can, with any hope of success, apply for a license to impose it ; and that the efforts which have been made to find it in other portions of that instrument, are too desperate to require to be encountered. I shall however examine those other portions before I have done, lest it should be supposed by those who have relied upon them, that what I omit to answer I believe to be unanswerable

The clause of the constitution which relates to the admission of new States is in these words : " The Congress *may* admit " new States into this Union," &c., and the advocates for restriction maintain that the use of the word " may " imports discretion to admit or to reject ; and that in this discretion is wrapped up another—(that of prescribing the terms and conditions of admission in case you are willing to admit) *Cujus est dare ejus est disponere*. I will not for the present inquire whether this *involved* discretion to dictate the *terms* of admission belongs to you or not. It is fit that I should first look to *the nature and extent of it*.

I think I may assume that if such a power be any thing but nominal, it is much more than adequate to the present object—that it is a power of vast expansion, to which human sagacity can assign no reasonable limits—that it is a capacious reservoir of authority, from which you may take, in all time to come, as occasion may serve, the means of oppression as well as of benefaction. I know that it professes at this moment to be the

chosen instrument of protecting mercy, and would win upon us by its benignant smiles : but I know too it can frown, and play the tyrant, if it be so disposed. Notwithstanding the softness which it now assumes, and the care with which it conceals its giant proportions beneath the deceitful drapery of sentiment, when it next appears before you it may show itself with a sterner countenance and in more awful dimensions. It is, to speak the truth, Sir, a power of colossal size—if indeed it be not an abuse of language to call it by the gentle name of a *power*. Sir, it is a wilderness of powers, of which fancy in her happiest mood is unable to perceive the far distant and shadowy boundary. Armed with such a power, with Religion in one hand and Philanthropy in the other, and followed with a goodly train of public and private virtues, you may achieve more conquests over sovereignties not your own than falls to the common lot of even uncommon ambition. By the aid of such a power, skilfully employed, you may “bridge your way” over the Hellespont that separates State legislation from that of Congress ; and you may do so for pretty much the same purpose with which Xerxes once bridged his way across the Hellespont, that separates Asia from Europe. He did so, in the language of Milton, “the liberties of Greece to yoke.” You may do so for the analogous purpose of subjugating and reducing the sovereignties of States, as your taste or convenience may suggest, and fashioning them to your imperial will. There are those in this House who appear to think, and I doubt not sincerely, that the particular restraint now under consideration is wise, and benevolent, and good : wise as respects the Union—good as respects Missouri—benevolent as respects the unhappy victims whom with a novel kindness it would incarcerate in the South, and bless by decay and extirpation. Let all such beware, lest in their desire for the effect which they believe the restriction will produce, they are too easily satisfied that they have the right to impose it. The moral beauty of the present purpose, or even its political recommendations, (whatever they may be,) can do nothing for a power like this, which claims to prescribe conditions *ad libitum*, and to be competent to *this* purpose, because it is competent to *all*. (This restriction, if it be not smothered in its birth, will be

but a small part of the progeny of that prolific power. It teems with a mighty brood, of which this may be entitled to the distinction of comeliness as well as of primogeniture. The rest may want the boasted loveliness of their predecessor, and be even uglier than "Laplaud witches.")

Perhaps, Sir, you will permit me to remind you that it is almost always in company with those considerations that interest the heart in some way or other, that encroachment steals into the world. (A bad purpose throws no veil over the licenses of power.) It leaves them to be seen as they are. It affords them no protection from the inquiring eye of jealousy. The danger is when a tremendous discretion like the present is attempted to be assumed, as on this occasion, in the names of Pity, of Religion, of National Honour and National Prosperity; when encroachment tricks itself out in the robes of Piety, or Humanity, or addresses itself to pride of country, with all its kindred passions and motives. It is then that the guardians of the constitution are apt to slumber on their watch, or, if awake, to mistake for lawful rule some pernicious arrogation of power.)

I would not discourage *authorized* legislation upon those kindly, generous, and noble feelings which Providence has given to us for the best of purposes: but when *power to act* is under discussion, I will not look to the end in view, lest I should become indifferent to the lawfulness of the means. Let us discard from this high constitutional question, all those extrinsic considerations which have been forced into its discussion. Let us endeavour to approach it with a philosophic impartiality of temper—with a sincere desire to ascertain the boundaries of our authority, and a determination to keep our wishes in subjection to our allegiance to the constitution.

Slavery, we are told in many a pamphlet, memorial, and speech, with which the press has lately groaned, is a foul blot upon our otherwise immaculate reputation. Let this be conceded—yet you are no nearer than before to the conclusion that you possess power which may deal with other subjects as effectually as with this. Slavery, we are further told, with some pomp of metaphor, is a canker at the root of all that is excellent in this republican empire, a pestilent disease that is snatching the

youthful bloom from its cheek, prostrating its honour and withering its strength. Be it so—yet if you have power to medicine to it in the way proposed, and in virtue of the diploma which you claim, you have also power in the distribution of your political alexipharmics to present the deadliest drugs to every territory that would become a State, and bid it drink or remain a colony forever. Slavery, we are also told, is now “rolling onward with a rapid tide towards the boundless regions of the West,” threatening to doom them to sterility and sorrow, unless some potent voice can say to it—thus far shalt thou go and no farther. Slavery engenders pride and indolence in him who commands, and inflicts intellectual and moral degradation on him who serves. Slavery, in fine, is unchristian and abominable. Sir, I shall not stop to deny that slavery is all this and more; but I shall not think myself the less authorized to deny that it is for you to stay the course of this dark torrent, by opposing to it a mound raised up by the labours of this portentous discretion on the domain of others—a mound which you cannot erect but through the instrumentality of a trespass of no ordinary kind—not the comparatively innocent trespass that beats down a few blades of grass which the first kind sun or the next refreshing shower may cause to spring again—but that which levels with the ground the lordliest trees of the forest, and claims immortality for the destruction which it inflicts.

I shall not, I am sure, be told that I exaggerate this power. It has been admitted here and elsewhere that I do not. But I want no such concession. It is manifest that as a discretionary power it is every thing or nothing—that its head is in the clouds, or that it is a mere figment of enthusiastic speculation—that it has no existence, or that it is an alarming vortex ready to swallow up all such portions of the sovereignty of an infant State as you may think fit to cast into it as preparatory to the introduction into the union of the miserable residue. No man can contradict me when I say, that if you have this power, you may squeeze down a new-born sovereign State to the size of a pigmy, and then taking it between finger and thumb, stick it into some nitch of the Union, and still continue by way of mockery to call it *a State in the sense of the constitution*. You may waste it to a shadow, and

then introduce it into the society of flesh and blood an object of scorn and derision. You may sweat and reduce it to a thing of skin and bone, and then place the ominous skeleton beside the ruddy and healthful members of the Union, that it may have leisure to mourn the lamentable difference between itself and its companions, to brood over its disastrous promotion, and to seek in justifiable discontent an opportunity for separation, and insurrection, and rebellion. What may you not do by dexterity and perseverance with this terrific power? You may give to a new State, in the form of terms which it cannot refuse, (as I shall show you hereafter,) a statute book of a thousand volumes—providing not for ordinary cases only, but even for possibilities: you may lay the yoke, no matter whether light or heavy, upon the necks of the latest posterity; you may send this searching power into every hamlet for centuries to come, by laws enacted in the spirit of prophecy, and regulating all those dear relations of domestic concern which belong to local legislation, and which even local legislation touches with a delicate and sparing hand. This is the first inroad. But will it be the last? This provision is but a pioneer for others of a more desolating aspect. It is that fatal bridge of which Milton speaks, and when once firmly built, what shall hinder you to pass it when you please for the purpose of plundering power after power at the expense of new States, as you will still continue to call them, and raising up prospective codes irrevocable and immortal, which shall leave to those States the empty shadows of domestic sovereignty, and convert them into petty pageants, in themselves contemptible, but rendered infinitely more so by the contrast of their humble faculties with the proud and admitted pretensions of those who having doomed them to the inferiority of vassals, have condescended to take them into their society and under their protection?

I shall be told, perhaps, that you can have no temptation to do all or any part of this, and, moreover, that you can do nothing of yourselves, or, in other words, without the concurrence of the new State. The last of these suggestions I shall examine by and by. To the first I answer, that it is not incumbent upon me to prove that this discretion will be abused. It is enough for me to prove the vastness of the power as an inducement to

make us pause upon it, and to inquire with attention whether there is any apartment in the constitution large enough to give it entertainment. It is more than enough for me to show that vast as is this power, it is with reference to mere territories an *irresponsible* power. Power is irresponsible when it acts upon those who are defenceless against it—who cannot check it, or contribute to check it, in its exercise—who can resist it only by force. The territory of Missouri has no check upon this power. It has no share in the government of the Union. In this body it has no representative. In the other House it has, by courtesy, an agent, who may remonstrate, but cannot vote. That such an irresponsible power is not likely to be abused, who will undertake to assert? If it is not, "Experience is a cheat, and fact a liar." The power which England claimed over the colonies was such a power, and it was abused—and hence the Revolution. Such a power is always perilous to those who wield it, as well as to those on whom it is exerted. Oppression is but another name for irresponsible power, if History is to be trusted.

The free spirit of our constitution and of our people, is no assurance against the propension of unbridled power to abuse, when it acts upon colonial dependants rather than upon ourselves. Free States, as well as despots, have oppressed those whom they were bound to foster—and it is the nature of man that it should be so. The love of power, and the desire to display it when it can be done with impunity, is inherent in the human heart. Turn it out at the door, and it will in again at the window. Power is displayed in its fullest measure, and with a captivating dignity, by restraints and conditions. The *pruritas leges ferendi* is an universal disease; and conditions are laws as far as they go. The vanity of human wisdom, and the presumption of human reason, are proverbial. This vanity and this presumption are often neither reasonable nor wise. Humanity, too, sometimes plays fantastic tricks with power. Time, moreover, is fruitful in temptations to convert discretionary power to all sorts of purposes.

Time, that withers the strength of man and "strews around him" like autumnal leaves the ruins of his proudest monuments," produces great vicissitudes in modes of thinking and feeling. It brings a long with it, in its progress, new circumstances—new

combinations and modifications of the old—generating new views, motives, and caprices—new fanaticisms of endless variety—in short, new every thing. We ourselves are always changing—and what to-day we have but a small desire to attempt, to-morrow becomes the object of our passionate aspirations.

There is such a thing as Embusiasm, moral, religious, or political, or a compound of all three;—and it is wonderful what it will attempt, and from what imperceptible beginnings it sometimes rises into a mighty agent. Rising from some obscure or unknown source, it first shows itself a petty rivulet, which scarcely murmurs over the pebbles that obstruct its way—then it swells into a fierce torrent bearing all before it—and then again, like some mountain stream which occasional rains have precipitated upon the valley, it sinks once more into a rivulet, and finally leaves its channel dry. Such a thing has happened. I do not say that it is now happening. It would not become me to say so. But if it should occur, wo to the unlucky territory that should be struggling to make its way into the Union at the moment when the opposing inundation was at its height, and at the same instant this wide Mediterranean of discretionary powers, which it seems is ours, should open up all its sluices, and with a consensual rush, mingle with the turbid waters of the others!

* * * * *

“New States *may* be admitted by the Congress into this Union.” It is objected that the word “*may*” imports power, not obligation—a right to decide—a discretion to grant or refuse.

To this it might be answered that *power* is *duty* on many occasions. But let it be conceded that it is discretionary. What consequence follows? A power to refuse, in a case like this, does not necessarily involve a power to exact terms. You must look to the *result* which is the declared object of the power. Whether you will arrive at it, or not, may depend on your will; but you cannot compromise with the result intended and professed.

What then is the professed result? To admit a *State* into this *Union*.

What is that Union? A confederation of States equal in sovereignty—capable of every thing which the constitution does not forbid, or authorize Congress to forbid. It is an equal

Union, between parties equally sovereign. They were sovereign, independently of the Union. The object of the Union was common protection for the exercise of already existing sovereignty. The parties gave up a portion of that sovereignty to insure the remainder. As far as they gave it up by the common compact they have ceased to be sovereign. The Union provides the means of defending the residue : and it is into that Union that a new State is to come. By acceding to it, the new State is placed on the same footing with the original States. It accedes for the same purpose, *i. e.* protection for its unsundered sovereignty. If it comes in shorn of its beams—crippled and disparaged beyond the original States, it is not into the *original Union* that it comes. For it is a different sort of Union. The first was Union *inter pares* : This is a Union between *disparates*—between giants and a dwarf—between power and feebleness—between full proportioned sovereignties and a miserable image of power—a thing which that very Union has shrunk and shrivelled from its just size, instead of preserving it in its true dimensions.

It is into “this Union,” *i. e.* the Union of the Federal Constitution, that you are to admit, or refuse to admit. You can admit into no other. You cannot make the Union, as to the new State, what it is not as to the old ; for then it is not *this Union* that you open for the entrance of a new party. If you make it enter into a new and additional compact, is it any longer the same Union ?

We are told that admitting a State into the Union is a compact. Yes—but what sort of a compact ? A compact that it shall be a member of the Union, as the constitution has made it. You cannot new fashion it. You may make a compact to admit, but when admitted the original compact prevails. The Union is a compact, with a provision of political power and agents for the accomplishment of its objects. Vary that compact as to a new State—give new energy to that political power so as to make it act with more force upon a new State than upon the old—make the will of those agents more effectually the arbiter of the fate of a new State than of the old, and it may be confidently said that the new State has not entered into *this Union*, but into another

Union. How far the Union has been varied is another question. But that it has been varied is clear.

If I am told that by the bill relative to Missouri, you do not legislate upon a new State—I answer that you do ; and I answer further that it is immaterial whether you do or not. But it is upon Missouri, as a State, that your terms and conditions are to act. Until Missouri is a State, the terms and conditions are nothing. You legislate in the shape of terms and conditions, prospectively—and you so legislate upon it that when it comes into the Union it is to be bound by a contract degrading and diminishing its sovereignty, and is to be stripped of rights which the original parties to the Union did not consent to abandon and which that Union (so far as depends upon it) takes under its protection and guarantee.

Is the right to hold slaves a right which Massachusetts enjoys ? If it is, Massachusetts is under this Union in a different character from Missouri. The compact of Union for it, is different from the same compact of Union for Missouri. The power of Congress is different—every thing which depends upon the Union is, in that respect, different.

But it is immaterial whether you legislate for Missouri as a State or not. The effect of your legislation is to bring it into the Union with a portion of its sovereignty taken away.

But it is a *State* which you are to admit. What is a State in the sense of the constitution ? It is not a State in the general—but a State as you find it in the constitution. A State, generally, is a body politic or independent political society of men. But the State which you are to admit must be more or less than this political entity. What must it be ? Ask the constitution. It shows what it means by a State by reference to the parties to it. It must be such a State as Massachusetts, Virginia, and the other members of the American confederacy—a State with full sovereignty except as the constitution restricts it.

It is said that the word *may* necessarily implies the right of prescribing the terms of admission. Those who maintain this are aware that there are no express words (such as *upon such terms and conditions as Congress shall think fit*) words which it was natural to expect to find in the constitution, if the effect

contended for were meant. They put it, therefore, on the word *may*, and on that alone.

Give to that word all the force you please—what does it import? That Congress is not *bound* to admit a new State into this Union. Be it so for argument's sake. Does it follow that when you consent to admit into this Union a new State you can make it less in sovereign power than the original parties to that Union—that you can make the Union as to it what it is not as to them—that you can fashion it to your liking by compelling it to purchase admission into an Union by sacrificing a portion of that power which it is the sole purpose of the Union to maintain in all the plenitude which the Union itself does not impair? Does it follow that you can force upon it an additional compact not found in the compact of Union—that you can make it come into the Union less a *State*, in regard to sovereign power, than its fellows in that Union—that you can cripple its legislative competency, (beyond the constitution which is the pact of Union, to which you make it a party as if it had been originally a party to it,) by what you choose to call a *condition*, but which, whatever it may be called, brings the new government into the Union under new obligations to it, and with disparaged power to be protected by it.

In a word—the whole amount of the argument on the other side, is—that you may refuse to admit a new State, and that therefore if you admit, you may prescribe the terms.

The answer to that argument is—that even if you can refuse, you can prescribe no terms which are inconsistent with the act you are to do. You can prescribe no conditions which, if carried into effect, would make the new State less a sovereign State than, under the Union as it stands, it would be. You can prescribe no terms which will make the compact of Union between it and the original States essentially different from that compact among the original States. You may admit, or refuse to admit: but if you admit, you must admit a State in the sense of the constitution—a State with all such sovereignty as belongs to the original parties: and it must be into *this Union* that you are to admit it, not into a Union of your own dictating, formed out of the existing Union by qualifications and new compacts, altering

its character and effect, and making it fall short of its protecting energy in reference to the new State, whilst it acquires an energy of another sort—the energy of restraint and destruction.

I have thus endeavoured to show, that even if you have a discretion to refuse to admit—you have no discretion, if you are willing to admit, to insist upon any terms that impair the sovereignty of the admitted State as it would otherwise stand in the Union by the constitution which receives it into its bosom. To admit or not, is for you to decide. Admission once conceded, it follows as a corollary that you must take the new State as an equal companion with its fellows—that you cannot recast or new model the Union *pro hac vice*—but that you must receive it into the *actual Union*, and recognize it as a parcener in the common inheritance, without any other shackles than the rest have, by the constitution, submitted to bear—without any other extinction of power than is the work of the constitution acting indifferently upon all.

I may be told perhaps that the restriction, in this case, is the act of Missouri itself—that your law is nothing without its consent, and derives its efficacy from that alone.

V I shall have a more suitable occasion to speak on this topic hereafter, when I come to consider the treaty which ceded Louisiana to the United States. But I will say a few words upon it now of a more general application than it will in that branch of the argument be necessary to use.

A territory cannot surrender to Congress by anticipation, the whole, or a part, of the sovereign power, which, by the constitution of the Union, will belong to it when it becomes a State and a member of the Union. Its consent is, therefore, nothing. It is in no situation to make this surrender. It is under the government of Congress; if it can barter away a part of its sovereignty, by anticipation, it can do so as to the whole. For where will you stop? If it does not cease to be a State, in the sense of the constitution, with only a certain portion of sovereign power, what other smaller portion will have that effect? If you depart from the standard of the constitution, i. e. the quantity of domestic sovereignty left in the first contracting States, and secured by the original compact of Union, where will

you get another standard? Consent is no standard,—for consent may be gained to a surrender of all.

No State or Territory, in order to become a State, can alienate or surrender any portion of its sovereignty to the Union, or to a sister State, or to a foreign nation. It is under an incapacity to disqualify itself for all the purposes of government left to it in the constitution, by stripping itself of attributes which arise from the natural equality of States, and which the constitution recognizes, not only because it does not deny them, but presumes them to remain as they exist by the law of nature and nations. Inequality in the sovereignty of States is unnatural, and repugnant to all the principles of that law. Hence we find it laid down by the text writers on public law, that "Nature has established a perfect equality of rights between independent nations"—and that "Whatever the quality of a free sovereign nation gives to one, it gives to another."^{*} The constitution of the United States proceeds upon the truth of this doctrine. It takes the States as it finds them, **FREE AND SOVEREIGN ALIKE BY NATURE**. It receives from them portions of their power for the general good, and provides for the exercise of it by organized political bodies. It diminishes the individual sovereignty of each, and transfers, what it subtracts, to the government which it creates: it takes from all alike, and leaves them relatively to each other equal in sovereign power.

The honourable gentleman from New-York has put the constitutional argument altogether upon the clause relative to admission of new States into the Union. He does not pretend that you can find the power to restrain, in any extent, elsewhere: It follows that it is not a particular power to impose this restriction, but a power to impose restrictions *ad libitum*. It is competent to this, because it is competent to every thing. But he denies that there can be any power in man to hold in slavery his fellow-creature, and argues, therefore, that the prohibition is no restraint at all, since it does not interfere with the sovereign powers of Missouri.

* * * * *

^{*} *Vattel, Droit des Gens*, liv. 2, c. 3, s. 36.

One of the most signal errors with which the argument on the other side has abounded, is this of considering the proposed restriction as if levelled at the *introduction or establishment of slavery*. And hence the vehement declamation, which among other things, has informed us that slavery originated in fraud or violence.

The truth is, that the restriction has no relation, real or pretended, to the right of *making slaves of those who are free*, or of introducing slavery where it does not already exist. It applies to those who are admitted to be already slaves, and who (with their posterity) would continue to be slaves if they should remain where they are at present; and to a place where slavery already exists by the local law. Their civil condition will not be altered by their removal from Virginia, or Carolina, to Missouri. They will not be more slaves than they now are. Their abode, indeed, will be different, but their bondage the same. Their numbers may possibly be augmented by the diffusion, and I think they will. But this can only happen because their hardships will be mitigated, and their comforts increased. The checks to population, which exist in the older States will be diminished. The restriction, therefore, does not prevent the establishment of slavery, either with reference to persons or place; but simply inhibits the removal from place to place (the law in each being the same) of a slave, or make his emancipation the consequence of that removal. It acts professedly merely on slavery as it exists, and thus acting restrains its present lawful effects. That slavery, like many other human institutions, originated in fraud or violence, may be conceded: but, however it *originated*, it is established among us, and no man seeks a further establishment of it by new importations of freemen to be converted into slaves. On the contrary, all are anxious to mitigate its evils, by all the means within the reach of the appropriate authority, the domestic legislatures of the different States.

It can be nothing to the purpose of this argument, therefore, as the gentlemen themselves have shaped it, to inquire what was the origin of slavery. What is it now, and who are they that endeavour to innovate upon what it now is, (the advocates of this restriction who desire change by unconstitutional means, or its

opponents who desire to leave the whole matter to local regulation,) are the only questions worthy of attention.

Sir, if we too closely look to the rise and progress of long sanctioned establishments and unquestioned rights, we may discover other subjects than that of slavery, with which fraud and violence may claim a fearful connexion, and over which it may be our interest to throw the mantle of oblivion. What was the settlement of our ancestors in this country but an invasion of the rights of the Barbarians who inhabited it? That settlement, with slight exceptions, was effected by the slaughter of those who did no more than defend their native land against the intruders of Europe, or by unequal compacts and purchases, in which feebleness and ignorance had to deal with power and cunning. The savages who once built their huts where this proud Capitol, rising from its recent ashes, exemplifies the sovereignty of the American people, were swept away by the injustice of our fathers, and their domain usurped by force, or obtained by artifices yet more criminal. Our continent was full of those aboriginal inhabitants. Where are they or their descendants? Either "with years beyond the flood," or driven back by the swelling tide of our population from the borders of the Atlantic to the deserts of the West. You follow still the miserable remnants, and make *contracts* with them that seal their ruin. You purchase their lands, of which they know not the value, in order that you may sell them to advantage, increase your treasure, and enlarge your empire. Yet further—you pursue as they retire; and they must continue to retire until the Pacific shall stay their retreat, and compel them to pass away as a dream. Will you recur to those scenes of various iniquity for any other purpose than to regret and lament them? Will you pry into them with a view to shake and impair your rights of property and dominion?

But the broad denial of the sovereign right of Missouri, if it shall become a sovereign State, to recognize slavery by its laws, is rested upon a variety of grounds, all of which I will examine.

It is an extraordinary fact, that they who urge this denial with such ardent zeal, stop short of it in their conduct. There are now slaves in Missouri whom they do not insist upon delivering from their chains. Yet if it is incompetent to sovereign power to

continue slavery in Missouri, in respect of slaves who may yet be carried thither, show me the power that can continue it in respect of slaves who are there already. Missouri is out of the old limits of the Union, and beyond those limits, it is said, we can give no countenance to slavery, if we can countenance or tolerate it any where. It is plain, that there can be no slaves beyond the Mississippi at this moment, but in virtue of some power to make or keep them so. What sort of power was it that has made or kept them so? Sovereign power it could not be, according to the honourable gentlemen from Pennsylvania and New Hampshire;* and if sovereign power is unequal to such a purpose, less than sovereign power is yet more unequal to it. The laws of Spain and France could do nothing—the laws of the territorial government of Missouri could do nothing towards such a result, if it be a result which no laws, in other words, no sovereignty, could accomplish. The treaty of 1803 could do no more, in this view, than the laws of France, or Spain, or the territorial government of Missouri. A treaty is an act of sovereign power, taking the shape of a compact between the parties to it; and that which sovereign power cannot reach at all, it cannot reach by a treaty. Those who are now held in bondage, therefore, in Missouri, and their issue, are entitled to be free, if there be any truth in the doctrine of the honourable gentlemen; and if the proposed restriction leaves all such in slavery, it thus discredits the very foundation on which it reposes. To be inconsistent is the fate of false principles—but this inconsistency is the more to be remarked, since it cannot be referred to mere considerations of policy, without admitting that such considerations may be preferred (without a crime) to what is deemed a paramount and indispensable duty.

It is here too, that I must be permitted to observe, that the honourable gentlemen have taken great pains to show that this restriction is a mere work of supererogation by the principal argument on which they rest the proof of its propriety. Missouri, it is said, can have no power to do what the restriction would prevent. It would be void, therefore, without the restriction.

* Mr. Roberts, Mr. Lowrie, and Mr. Merrill.

Why then, I ask, is the restriction insisted upon? Restraint implies that there is something to be restrained: But the gentlemen justify the restraint by showing that there is nothing upon which it can operate! They demonstrate the wisdom and necessity of restraint, by demonstrating that with or without restraint, the subject is in the same predicament. This is to combat with a man of straw, and to put fetters upon a shadow.

The gentlemen must, therefore, abandon either their doctrine or their restriction—their argument or their object—for they are directly in conflict, and reciprocally destroy each other. It is evident, that they will not abandon their object, and of course, I must believe, that they hold their argument in as little real estimation as I myself do. The gentlemen can scarcely be sincere believers in their own principle. They have apprehensions, which they endeavour to conceal, that Missouri, as a State, will have power to continue slavery within its limits; and, if they will not be offended, I will venture to compare them, in this particular, with the duelist in Sheridan's comedy of the Rivals, who affecting to have no fear whatever of his adversary, is, nevertheless, careful to admonish Sir Lucius to hold him fast.

Let us take it for granted, however, that they are in earnest in their doctrine, and that it is very necessary to impose what they prove to be an unnecessary restraint: how do they support that doctrine?

The honourable gentleman on the other side* has told us as a proof of his great position, (that man cannot enslave his fellow man, in which is implied that all laws upholding slavery are absolute nullities,) that the nations of antiquity as well as of modern times have concurred in laying down that position as incontrovertible.

He refers us in the first place to the Roman law, in which he finds it laid down as a maxim: *Jure naturali omnes homines ab initio liberi nascebantur*. From the manner in which this maxim was pressed upon us, it would not readily have been conjectured that the honourable gentleman who used it had borrowed it from a slave-holding empire, and still less from a book of the

* Mr. King.

Institutes of Justinian, which treats of slavery, and justifies, and regulates it. Had he given us the context, we should have had the modifications of which the abstract doctrine was in the judgment of the Roman law susceptible. We should have had an explanation of the competency of that law, to convert, whether justly or unjustly, freedom into servitude, and to maintain the right of a master to the service and obedience of his slave.

The honourable gentleman might also have gone to Greece for a similar maxim and a similar commentary, speculative and practical.

He next refers us to Magna Charta. I am somewhat familiar with Magna Charta, and I am confident that it contains no such maxim as the honourable gentleman thinks he has discovered in it. The great charter was extorted from John, and his feeble son and successor, by haughty slave-holding barons, who thought only of themselves and the commons of England, (then inconsiderable,) whom they wished to enlist in their efforts against the crown. * There is not in it a single word which condemns civil slavery. Freemen only are the objects of its protecting care. "Nullus liber homo," is its phraseology. The serfs, who were chained to the soil—the villeins regardant and in gross, were left as it found them. All England was then full of slaves, whose posterity would by law remain slaves as with us, except only that the issue followed the condition of the father instead of the mother. The rule was "Partus sequitur patrem"—a rule more favourable, undoubtedly, from the very precariousness of its application, to the gradual extinction of slavery, than ours, which has been drawn from the Roman law, and is of sure and unavoidable effect.

Still less has the *Petition of Right*, presented to Charles I., by the Long Parliament, to do with the subject of civil slavery. It looked merely, as Magna Charta had not done before it, to the freemen of England—and sought only to protect them against royal prerogative and the encroaching spirit of the Stewarts.

As to the *Bill of Rights*, enacted by the Convention Parliament of 1688, it is almost a duplicate of the *Petition of Right*, and arose out of the recollection of that political tyranny from

which the nation had just escaped, and the recurrence of which it was intended to prevent. It contains no abstract principles. It deals only with practical checks upon the power of the monarch, and in safeguards for institutions essential to the preservation of the public liberty. That it was not designed to anathematize civil slavery may be taken for granted, since at that epoch and long afterwards the English government inundated its foreign plantations with slaves, and supplied other nations with them as merchandise, under the sanction of solemn treaties negotiated for that purpose. And here I cannot forbear to remark that we owe it to that same government, when it stood towards us in the relation of parent to child, that involuntary servitude exists in our land, and that we are now deliberating whether the prerogative of correcting its evils belongs to the national or the State governments. In the early periods of our colonial history every thing was done by the mother country to encourage the importation of slaves into North America, and the measures which were adopted by the Colonial Assemblies to prohibit if, were uniformly negatived by the crown. It is not therefore our fault, nor the fault of our ancestors, that this calamity has been entailed upon us ; and notwithstanding the ostentation with which the loitering abolition of the slave trade by the British parliament has been vaunted, the principal consideration which at last reconciled it to that measure was, that by suitable care, the slave population in their West India islands (already fully stocked) might be kept up and even increased without the aid of importation. In a word, it was cold calculations of interest, and not the suggestions of humanity, or a respect for the philanthropic principles of Mr. Wilberforce which produced their tardy abandonment of that abominable traffic.

Of the Declaration of our Independence, which has also been quoted in support of the perilous doctrines now urged upon us, I need not now speak at large. I have shown on a former occasion how idle it is to rely upon that instrument for such a purpose, and I will not fatigue you by mere repetition. The self-evident truths announced in the Declaration of Independence are not truths at all, if taken literally ; and the practical conclusions contained in the same passage of that Declaration prove that they were never designed to be so received.

The Articles of Confederation contain nothing on the subject ; whilst the actual Constitution recognizes the legal existence of slavery by various provisions. The power of prohibiting the slave trade is involved in that of regulating commerce, but this is coupled with an express inhibition to the exercise of it for twenty years. How then can that Constitution which expressly permits the importation of slaves, authorize the national government to set on foot a crusade against slavery ?

The clause respecting fugitive slaves is affirmative and active in its effects. It is a direct sanction and positive protection of the right of the master to the services of his slave as derived under the local laws of the States. The phraseology in which it is wrapped up still leaves the intention clear, and the words, " persons held to " service or labour in one State under the laws thereof," have always been interpreted to extend to the case of slaves, in the various acts of Congress which have been passed to give efficacy to the provision, and in the judicial application of those laws. So also in the clause prescribing the ratio of representation—the phrase, " three-fifths of all other persons," is equivalent to *slaves*, or it means nothing. And yet we are told that those who are acting under a constitution which sanctions the existence of slavery in those States which choose to tolerate it, are at liberty to hold that no law can sanction its existence !

It is idle to make the rightfulness of an act the measure of sovereign power. The distinction between sovereign power and the moral right to exercise it, has always been recognized. All political power may be abused, but is it to stop where abuse may begin ? The power of declaring war is a power of vast capacity for mischief, and capable of inflicting the most wide-spread desolation. But it is given to Congress without stint and without measure. Is a citizen, or are the courts of justice to inquire whether that, or any other law, is just, before they obey or execute it ? And are there any degrees of injustice which will withdraw from sovereign power the capacity of making a given law ?

But sovereignty is said to be *deputed* power. Deputed—by whom ? By the People, because the power is theirs. And if it be theirs, does not the restriction take it away ? Examine the Constitution of the Union, and it will be seen that the *People* of

the States are regarded as well as the *States* themselves. The constitution was made by the People, and ratified by the People.

Is it fit, then, to hold that all the sovereignty of a State is in the government of the State? So much is there as the People grant : and the People can take it away, or give more, or new model what they have already granted. It is this right which the proposed restriction takes from Missouri. You give them an immortal constitution, depending on your will, not on theirs. The People and their posterity are to be bound for ever by this restriction ; and upon the same principle, any other restriction may be imposed. Where then is their power to change the constitution, and to devolve new sovereignty upon the State government ? You limit their sovereign capacity to do it ; and when you talk of a State, you mean the People as well as the Government. The People are the source of all power—you dry up that source. They are the reservoir—you take out of it what suits you.

It is said that this government is a government of deputed powers. So is every government—and what power is not deputed remains. But the people of the *United States* can give it more if they please, as the people of each State can do in respect to its own government. And here it is well to remember that this is a government of enumerated, as well as deputed powers ; and to examine the clause as to the admission of new States, with that principle in view. Now assume that it is a part of the sovereign power of *the people of Missouri* to continue slavery, and to devolve that power upon its government—and then to take it away—and then to give it again. The government is their creature—the means of exercising their sovereignty, and they can vary those means at their pleasure. Independently of the Union, their power would be unlimited. By coming into the Union, they part with some of it, and are thus less sovereign.

Let us then see whether they part with this power.

If they have parted with this portion of sovereign power, it must be under that clause of the national constitution which gives to Congress “ power to admit new States into this Union.” And it is said that this necessarily implies the authority of prescribing the conditions, upon which such new States shall be admitted. This has been put into the form of a syllogism which is thus stated :

Major. Every universal proposition includes all the means, manner, and terms of the act to which it relates.

Minor. But this is a universal proposition.

Conclusion. Therefore, the means, manner, and terms are involved in it.

But this syllogism is fallacious, and any thing else may be proved by it, by assuming one of its members which involves the conclusion. The *minor* is a mere postulate.

Take it in this way :

Major. None but a universal proposition includes in itself the terms and conditions of the act to be done.

Minor. But this is not such a universal proposition.

Conclusion. Therefore, it does not contain in itself the terms and conditions of the act.

In both cases the minor is a gratuitous postulate.

But I deny that a universal proposition *as to a specific act*, involves the terms and conditions of that act, so as to vary it and substitute another and a different act in its place. The proposition contained in the clause is *universal* in one sense only. It is *particular* in another. It is universal as to the power to admit or refuse. It is particular as to the being or thing to be admitted, and the compact by which it is to be admitted. The sophistry consists in extending the universal part of the proposition in such a manner as to make out of it another universal proposition. It consists in confounding the right to produce or to refuse to produce a *certain defined effect*, with a right to produce a *different effect* by refusing otherwise to produce any effect at all. It makes the *actual right* the instrument of obtaining *another right* with which the actual right is incompatible. It makes, in a word, lawful power the instrument of unlawful usurpation. The *result* is kept out of sight by this mode of reasoning. The discretion to decline that result, which is called a universal proposition, is singly obtruded upon us. But in order to reason correctly, you must keep in view the defined result, as well as the discretion to produce or to decline to produce it. The result is the particular part of the proposition ; therefore, the discretion to produce or decline it, is the universal part of it. But because the *last* is found to be universal, it is taken for granted

that the *first* is also universal. This is a sophism too manifest to impose.

But discarding the machinery of syllogisms as unfit for such a discussion as this, let us look at the clause with a view of interpreting it by the rules of sound logic and common sense.

The power is "to admit new States into this Union ;" and it may be safely conceded that here is discretion to admit or refuse. The question is, what must we do if we do any thing ? What must we admit, and into what ? The answer is a *State*—and into *this Union*.

The distinction between federal rights and local rights, is an idle distinction. Because the new State acquires *federal* rights, it is not, therefore, in *this Union*. The Union is a compact ; and is it an equal party to that compact, because it has equal federal rights ?

How is the Union formed ? By equal contributions of power. Make one member sacrifice more than other, and it becomes unequal. The compact is of two parts,

1. The thing obtained—federal rights.
2. The price paid—local sovereignty.

You may disturb the balance of the Union, either by diminishing the thing acquired, or increasing the sacrifice paid.

What were the purposes of coming into the Union among the original States ? The States were originally sovereign without limit, as to foreign and domestic concerns. But being incapable of protecting themselves singly, they entered into the Union to defend themselves against foreign violence. The domestic concerns of the people were not, in general, to be acted on by it. The security of the power of managing them by domestic legislature, is one of the great objects of the Union. The Union is a *means*, not an *end*. By requiring greater sacrifices of domestic power, the end is sacrificed to the means. Suppose the surrender of all, or nearly all, the domestic powers of legislation were required : the means would there have swallowed up the end.

The argument that the compact may be enforced, shows that the federal predicament is changed. The power of the Union not only acts on persons or citizens, but on the faculty of the government, and restrains it in a way which the constitution no

where authorizes. This new obligation takes away a right which is expressly "reserved to the people or the States," since it is nowhere granted to the government of the Union. You cannot do indirectly what you cannot do directly. It is said that *this Union* is competent to make compacts. Who doubts it? But can you make *this compact*? I insist that you cannot make it, because it is repugnant to the thing to be done.

The effect of such a compact would be to produce that inequality in the Union, to which the constitution, in all its provisions, is adverse. Every thing in it looks to equality among the members of the Union. Under it, you cannot produce inequality. Nor can you get beforehand of the constitution, and do it by anticipation. Wait until a State is in the Union, and you cannot do it: yet it is only upon the State in the Union that what you do begins to act.

* * * * *

But it seems, that although the proposed restriction may not be justified by the clause of the constitution which gives power to admit new States into the Union, separately considered, there are other parts of the constitution which combined with that clause will warrant it. And first we are informed that there is a clause in this instrument which declares that Congress *shall* guarantee to every State a republican form of government; that slavery and such a form of government are incompatible; and finally, as a conclusion from these premises, that Congress not only have a *right*, but are *bound* to exclude slavery from a new State. Here again, Sir, there is an edifying inconsistency between the argument and the measure which it professes to vindicate. By the argument it is maintained that Missouri cannot have a republican form of government, and at the same time tolerate negro slavery. By the measure it is admitted that Missouri may tolerate slavery, as to persons already in bondage there, and be nevertheless fit to be received into the Union. What sort of constitutional mandate is this which can thus be made to bend, and truckle, and compromise as if it were a simple rule of expediency that might admit of exceptions upon motives of counter-vailing expediency. There can be no such pliancy in the peremptory provisions of the constitution. They cannot be obeyed by

moieties and violated in the same ratio. They must be followed out to their full extent, or treated with that decent neglect which has at least the merit of forbearing to render contumacy obtrusive by an ostentatious display of the very duty which we in part abandon. If the decalogue could be observed in this casuistical manner, we might be grievous sinners, and yet be liable to no reproach. We might persist in all our *habitual* irregularities, and still be spotless. We might, for example, continue to covet our neighbours' goods, provided they were the same neighbours whose goods we had before coveted—and so of all the other commandments.

Will the gentlemen tell us that it is the *quantity of slaves*, not the *quality of slavery*, which takes from a government the republican form? Will they tell us (for they have not yet told us) that there are constitutional grounds (to say nothing of common sense,) upon which the slavery which now exists in Missouri may be reconciled with a republican form of government, while any addition to the *number of its slaves* (the quality of slavery remaining the same) from the other States, will be repugnant to that form, and metamorphose it into some non-descript government disowned by the constitution? They cannot have recourse to the treaty of 1803 for such a distinction, since independently of what I have before observed on that head, the gentlemen have contended that the treaty has nothing to do with the matter. They have cut themselves off from all chance of a convenient distinction in or out of that treaty, by insisting that slavery beyond the old United States is rejected by the constitution, and by the law of God as discoverable by the aid of either reason or revelation; and moreover that the treaty does not include the case, and if it did could not make it better. They have therefore completely discredited their own theory by their own practice, and left us no theory worthy of being seriously controverted. This peculiarity in reasoning of giving out a universal principle, and coupling with it a practical concession that it is wholly fallacious, has indeed run through the greater part of the arguments on the other side; but it is not, as I think, the more imposing on that account, or the less liable to the criticism which I have here bestowed upon it.

There is a remarkable inaccuracy on this branch of the subject into which the gentlemen have fallen, and to which I will give a moment's attention without laying unnecessary stress upon it. The government of a new State, as well as of an old State, must, I agree, be republican in its *form*. But it has not been very clearly explained what the *laws* which such a government may enact can have to do with its *form*. The form of the government is material only as it furnishes a security that those laws will protect and promote the public happiness, and be made in a republican spirit. The people being, in such a government, the fountain of all power, and their servants being periodically responsible to them for its exercise, the constitution of the Union takes for granted, (except so far as it imposes limitations,) that every such exercise will be just and salutary. The introduction or continuance of civil slavery is manifestly the mere result of the power of making laws. It does not in any degree enter into the form of the government. It presupposes that form already settled, and takes its rise not from the particular frame of the government, but from the general power which every government involves. Make the government what you will in its organization and in the distribution of its authorities, the introduction or continuance of involuntary servitude by the legislative power which it has created can have no influence on its pre-established form, whether monarchical, aristocratical, or republican. The form of government is still one thing, and the law, being a simple exertion of the ordinary faculty of legislation by those to whom that form of government has entrusted it; another. The gentlemen, however, identify an act of legislation sanctioning involuntary servitude with the form of government itself, and then assure us that the last is changed retroactively by the first, and is no longer republican !

But let us proceed to take a rapid glance at the reasons which have been assigned for this notion that involuntary servitude and a republican form of government are perfect antipathies. The gentleman from New-Hampshire* has defined a republican government to be that in which all the *men* participate in its

* Mr. Morrill.

power and privileges : from whence it follows that where there are slaves, it can have no existence. A definition is no proof, however, and even if it be dignified (as I think it was) with the name of a maxim, the matter is not much mended. It is Lord Bacon who says " that nothing is so easily made as a maxim ;" and certainly a definition is manufactured with equal facility. A political maxim is the work of induction, and cannot stand against experience, or stand on any thing but experience. But this maxim, or definition, or whatever else it may be, sets fact at defiance. If you go back to antiquity, you will obtain no countenance for this hypothesis ; and if you look at home you will gain still less. I have read that Sparta, and Rome, and Athens, and many others of the ancient family, were Republics. They were so in form undoubtedly— the last approaching nearer to a perfect Democracy than any other government which has yet been known in the world. Judging of them also by their fruits, they were of the highest order of Republics. Sparta could scarcely be any other than a Republic, when a Spartan matron could say to her son just marching to battle, RETURN VICTORIOUS, OR RETURN NO MORE. It was the unconquerable spirit of Liberty, nurtured by Republican habits and institutions, that illustrated the pass of Thermopylæ. Yet slavery was not only tolerated in Sparta, but was established by one of the fundamental laws of Lycurgus, having for its object the encouragement of that very spirit. Attica was full of slaves—yet the love of liberty was its characteristic. What else was it that foiled the whole power of Persia at Marathon and Salamis ? What other soil than that which the genial Sun of Republican freedom illuminated and warmed, could have produced such men as Leonidas and Miltiades, Themistocles and Epaminondas ? Of Rome it would be superfluous to speak at large. It is sufficient to name the mighty mistress of the world, before Sylla gave the first stab to her liberties and the great dictator accomplished their final ruin, to be reminded of the practicability of union between civil slavery and an ardent love of liberty cherished by republican establishments.

If we return home for instruction upon this point, we perceive that same union exemplified in many a State, in which " Liberty

"has a temple in every house, an altar in every heart," while involuntary servitude is seen in every direction. Is it denied that those States possess a republican form of government? If it is, why does our power of correction sleep? Why is the constitutional guaranty suffered to be inactive? Why am I permitted to fatigue you, as the representative of a slaveholding State with the discussion of the *auga canora* (for so I think them) that have been forced into this debate contrary to all the remonstrances of taste and prudence? Do gentlemen perceive the consequences to which their arguments must lead if they are of any value? Do they reflect that they lead to emancipation in the old United States—or to an exclusion of Delaware, Maryland, and all the South, and a great portion of the West from the Union? My honourable friend from Virginia has no business here, if this disorganizing creed be any thing but the production of a heated brain. The State to which I belong, must "perform a lustration"—must purge and purify herself from the seculence of civil slavery, and emulate the States of the north in their zeal for throwing down the gloomy idol which we are said to worship, before her senators can have any title to appear in this high assembly. It will be in vain to urge that the old United States are exceptions to the rule—or rather (as the gentlemen express it,) that they have no *disposition* to apply the rule to them. There can be no exceptions, by implication only, to such a rule; and expressions which justify the exemption of the old States by inference, will justify the like exemption of Missouri, unless they point exclusively to them, as I have shown they do not. The guarded manner, too, in which some of the gentlemen have occasionally expressed themselves on this subject, is somewhat alarming. They have no *disposition* to meddle with slavery in the old United States. Perhaps not—but who shall answer for their successors? Who shall furnish a pledge that the principle once engrafted into the constitution, will not grow, and spread, and fructify, and overshadow the whole land? It is the natural office of such a principle to wrestle with slavery, wheresoever it finds it. New States, colonized by the apostles of this principle, will enable it to set on foot a fanatical crusade against all who still continue to

tolerate it, although no practicable means are pointed out by which they can get rid of it consistently with their own safety. At any rate, a present forbearing disposition, in a few or in many, is not a security upon which much reliance can be placed upon a subject as to which so many selfish interests and ardent feelings are connected with the cold calculations of policy. Admitting, however, that the old United States are in no danger from this principle—why is it so? There can be no other answer (which these zealous enemies of slavery can use) than that the constitution recognizes slavery as existing or capable of existing in those States. The constitution, then, admits that slavery and a republican form of government are not incongruous. It associates and binds them up together, and repudiates this wild imagination which the gentlemen have pressed upon us with such an air of triumph. But the constitution does more, as I have heretofore proved. It concedes that slavery may exist in a new State, as well as in an old one—since the language in which it recognizes slavery comprehends new States as well as actual. I trust then that I shall be forgiven if I suggest, that no eccentricity in argument can be more trying to human patience, than a formal assertion that a constitution, to which slave-holding States were the most numerous parties, in which slaves are treated as property as well as persons, and provision is made for the security of that property, and even for an augmentation of it, by a temporary importation from Africa, a clause commanding Congress to guarantee a republican form of government to those very States, as well as to others, authorizes you to determine that slavery and a republican form of government cannot co-exist.

But if a republican form of government is that in which *all* the men have a share in the public power, the slave-holding States will not alone retire from the Union. The constitutions of some of the other States do not sanction universal suffrage, or universal eligibility. They require citizenship, and age, and a certain amount of property, to give a title to vote or to be voted for; and they who have not those qualifications are just as much disfranchised, with regard to the government and its power, as if they were slaves. They have civil rights indeed (and so have slaves in a less degree;) but they have no share in the govern-

ment. Their province is to obey the laws, not to assist in making them. All such States must therefore be forisfamiliarized with Virginia and the rest, or change their system : For the constitution being absolutely silent on those subjects, will afford them no protection. The Union might thus be reduced from an Union to an unit. Who does not see that such conclusions flow from false notions—that the true theory of a republican government is mistaken—and that in such a government, rights political and civil, may be qualified by the fundamental law, upon such inducements as the freemen of the country deem sufficient ? That civil rights may be qualified as well as political, is proved by a thousand examples. Minors, resident aliens, who are in a course of naturalization—the other sex, whether maids, or wives, or widows, furnish sufficient practical proofs of this.

Again—if we are to entertain these hopeful abstractions, and to resolve all establishments into their imaginary elements in order to recast them upon some Utopian plan, and if it be true that all the *men* in a republican government must help to wield its power, and be equal in rights, I beg leave to ask the honourable gentleman from New-Hampshire—and why not all the *women* ? They too are God's creatures, and not only very fair but very rational creatures ; and our great ancestor, if we are to give credit to Milton, accounted them the “ wisest, virtourest, “ discreetest, best ;” although to say the truth he had but one specimen from which to draw his conclusion, and possibly if he had had more, would not have drawn it at all. They have, moreover, acknowledged civil rights in abundance, and upon abstract principles more than their masculine rulers allow them in fact. Some monarchies, too, do not exclude them from the throne. We have all read of Elizabeth of England, of Catharine of Russia, of Semiramis, and Zenobia, and a long list of royal and imperial dames, about as good as an equal list of royal and imperial lords. Why is it that their exclusion from the power of a popular government is not destructive of its republican character ? I do not address this question to the honourable gentleman's gallantry, but to his abstraction, and his theories, and his notions of the infinite perfectibility of human institutions, borrowed from Godwin and the turbulent philosophers of France.

For my own part, Sir, if I may have leave to say so much in the presence of this mixed uncommon audience, I confess I am no friend to female government, unless indeed it be that which reposes on gentleness, and modesty, and virtue, and feminine grace and delicacy--and how powerful a government that is, we have all of us, as I suspect, at some time or other experienced ! But if the ultra republican doctrines which have now been brouched should ever gain ground among us, I should not be surprized if some romantic reformer, treading in the footsteps of Mrs. Wolstoncraft, should propose to repeal our republican law salique, and claim for our wives and daughters a full participation in political power, and to add to it that domestic power, which in some families, as I have heard, is as absolute and un-republican as any power can be.

I have thus far allowed the honourable gentlemen to avail themselves of their assumption that the constitutional command to guarantee to the States a republican form of government, gives power to coerce those States in the adjustment of the details of their constitutions upon theoretical speculations. But surely it is passing strange that any man, who thinks at all, can view this salutary command as the grant of a power so monstrous ; or look at it in any other light than as a protecting mandate to Congress to interpose with the force and authority of the Union against that violence and usurpation, by which a member of it might otherwise be oppressed by profligate and powerful individuals, or ambitious and unprincipled factions.

In a word, the resort to this portion of the constitution for an argument in favour of the proposed restriction, is one of those extravagancies (I hope I shall not offend by this expression) which may excite our admiration, but cannot call for a very rigorous refutation. I have dealt with it accordingly, and have now done with it.

We are next invited to study that clause of the constitution which relates to the migration or importation, before the year 1808, of such persons as any of the States then existing should think proper to admit. It runs thus : " The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the

" Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation not exceeding ten dollars for each person."

It is said that this clause empowers Congress, after the year 1808, to prohibit the passage of slaves from State to State, and the word " migration" is relied upon for that purpose.

I will not say that the proof of the existence of a power by a clause which, as far it goes, denies it, is always inadmissible; but I will say that it is always feeble. On this occasion, it is singularly so. The power, in an affirmative shape, cannot be found in the constitution; or if it can, it is equivocal and unsatisfactory. How do the gentlemen supply this deficiency? by the aid of a negative provision in an article of the constitution in which many restrictions are inserted *ex abundanti cautela*, from which it is plainly impossible to infer that the power to which they apply would otherwise have existed. Thus—" No bill of attainder or ex post facto law shall be passed." Take away the restriction—could Congress pass a bill of attainder, the trial by jury in criminal cases being expressly secured by the constitution? The inference, therefore, from the prohibition in question, whatever may be its meaning, to the power which it is supposed to restrain, but which you cannot lay your finger upon with any pretensions to certainty, must be a very doubtful one. But the import of the prohibition is also doubtful, as the gentlemen themselves admit. So that a doubtful power is to be made certain by a yet more doubtful negative upon power—or rather a doubtful negative, where there is no evidence of the corresponding affirmative, is to make out the affirmative and to justify us in acting upon it, in a matter of such high moment, that *questionable* power should not dare to approach it. If the negative were perfectly clear in its import, the conclusion which has been drawn from it would be rash, because it might have proceeded, as some of the negatives in whose company it is found evidently did proceed, from great anxiety to prevent such assumptions of authority as are now attempted. But when it is conceded, that the supposed import of this negative (as to the term *migration*) is ambiguous, and that it may have been used in a very different sense from that which is imputed to it, the conclusion acquires a

character of boldness, which, however some may admire, the wise and reflecting will not fail to condemn.

In the construction of this clause, the first remark that occurs is, that the word *MIGRATION* is associated with the word *IMPORTATION*. I do not insist that *noscitur a sociis* is as good a rule in matters of interpretation as in common life—but it is, nevertheless, of considerable weight when the associated words are not qualified by any phrases that disturb the effect of their fellowship; and unless it announces, (as in this case it does not,) by specific phrases combined with the associated term, a different intention. Moreover, the ordinary unrestricted import of the word *migration* is what I have here supposed. A removal from district to district, within the same jurisdiction, is never denominated a *migration* of persons. I will concede to the honourable gentlemen, if they will accept the concession, that ants may be said to migrate when they go from one ant hill to another at no great distance from it. But even then they could not be said to migrate, if each ant-hill was their home in virtue of some federal compact with insects like themselves. But, however this may be, it should seem to be certain that human beings do not *migrate*, in the sense of a constitution, simply because they transplant themselves, from one place, to which that constitution extends, to another which it equally covers.

If this word *migration* applied to freemen, and not to slaves, it would be clear that removal from State to State would not be comprehended within it. Why then, if you choose to apply it to slaves, does it take another meaning as to the place from whence they are to come?

Sir, if we once depart from the usual acceptation of this term, fortified as it is by its union with another in which there is nothing in this respect equivocal, will gentlemen please to intimate the point at which we are to stop? *Migration* means, as they contend, a removal from State to State, within the pale of the common government. Why not a removal also from county to county within a particular State—from plantation to plantation—from farm to farm—from hovel to hovel? Why not any exertion of the power of locomotion? I protest I do not see, if this arbitrary limitation of the natural sense of the term *migration*

be warrantable, that a person to whom it applies may not be compelled to remain immoveable all the days of his life (which could not well be many) in the very spot, literally speaking, in which it was his good or his bad fortune to be born.

Whatever may be the latitude in which the word "persons" is capable of being received, it is not denied that the word "importation" indicates a bringing in from a jurisdiction foreign to the United States. The two *termini* of the *importation*, here spoken of, are a foreign country and the American Union—the first the *terminus a quo*, the second the *terminus ad quem*. The word *migration* stands in simple connexion with it, and of course is left to the full influence of that connexion. The natural conclusion is, that the same *termini* belong to each, or in other words, that if the *importation* must be abroad, so also must be the *migration*—no other *termini* being assigned to the one which are not manifestly characteristic of the other. This conclusion is so obvious, that to repel it, the word *migration* requires, as an appendage, explanatory phraseology, giving to it a different beginning from that of *importation*. To justify the conclusion that it was intended to mean a removal from State to State, each within the sphere of the constitution in which it is used, the addition of the words *from one to another State in this Union*, were indispensable. By the omission of these words, the word "migration" is compelled to take every sense of which it is fairly susceptible from its immediate neighbour "importation." In this view it means a *coming*, as "importation" means a *bringing*, from a foreign jurisdiction into the United States. That it is susceptible of this meaning, nobody doubts. I go further. It can have no other meaning in the place in which it is found. It is found in the constitution of this Union—which, when it speaks of *migration* as of a general concern, must be supposed to have in view a migration into the domain which itself embraces as a general government.

Migration, then, even if it comprehends slaves, does not mean the removal of them from State to State, but means the coming of slaves from places beyond their limits and their power. And if this be so, the gentlemen gain nothing for their argument by showing that slaves were the objects of this term.

An honourable gentleman from Rhode Island,* whose speech was distinguished for its ability, and for an admirable force of reasoning, as well as by the moderation and mildness of its spirit, informed us, with less discretion than in general he exhibited, that the word "migration" was introduced into this clause at the instance of some of the Southern States, who wished by its instrumentality to guard against a prohibition by Congress of the passage into those States of slaves from other States. He has given us no authority for this supposition, and it is, therefore, a gratuitous one. How improbable it is, a moment's reflection will convince him. The African slave-trade being open during the whole of the time to which the entire clause in question referred, such a purpose could scarcely be entertained; but if it had been entertained, and there was believed to be a necessity for securing it, by a restriction upon the power of Congress to interfere with it, is it possible that they who deemed it important would have contented themselves with a vague restraint, which was calculated to operate in almost any other manner than that which they desired? If fear and jealousy, such as the honourable gentleman has described, had dictated this provision, a better term than that of "migration," simple and unqualified, and joined too with the word "importation," would have been found to tranquillize those fears and satisfy that jealousy. Fear and jealousy are watchful, and are rarely seen to accept a security short of their object, and less rarely to shape that security, of their own accord, in such a way as to make it no security at all. They always seek an explicit guaranty; and that this is not such a guaranty this debate has proved, if it has proved nothing else.

Sir, I shall not be understood by what I have said to admit that the word *migration* refers to *slaves*. I have contended only that if it does refer to slaves it is in this clause synonymous with *importation*; and that it cannot mean the mere passage of slaves, with or without their masters, from one State in the Union to another.

But I now deny that it refers to slaves at all. I am not for any man's opinions or his histories upon this subject. I am not

* Mr. Burrill.

accustomed *jurare in verba magistri*. I shall take the clause as I find it, and do my best to interpret it."

* * * * *

[After going through with that part of his argument relating to this clause of the constitution, which I have not been able to restore from the imperfect notes in my possession, Mr. Pinkney concluded his speech by expressing a hope that (what he deemed) the perilous principles urged by those in favour of the restriction upon the new State would be disavowed or explained, or that at all events the application of them to the subject under discussion would not be pressed, but that it might be disposed of in a manner satisfactory to all by a prospective prohibition of slavery in the territory to the north and west of Missouri.]

N^o. VIII.

OPINION IN THE CASE OF COHENS AGAINST THE
STATE OF VIRGINIA.

By the constitution of the United States, power is given to Congress "to exercise exclusive legislation, in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States."

This clause was no doubt inserted in the constitution from the indispensable necessity which was felt to exist, that the national government should have entire authority in the place where it was to be located. It was a government established for national purposes, and it was fit and proper that the national legislature, and the members of it, should be entirely free from, and unmolested by, the authority or power of any State legislature.

By an act of Congress power is given to the corporation of the City of Washington, to authorize the drawing of lotteries for effecting any important improvement in the city, which the ordinary funds or revenue thereof will not accomplish: Provided, that the amount to be raised in each year shall not exceed the

sum of ten thousand dollars ; and provided, also, that the object for which the money is intended to be raised, shall be first submitted to the President of the United States, and shall be approved by him.

Under the power given by this act of Congress, the corporation of the city of Washington have established lotteries for the purpose of effecting important improvements in the said city, which the ordinary funds or revenue thereof will not accomplish ; and the object for which the money intended to be raised by the said lotteries is to be applied, has been submitted to the President of the United States, and has been approved by him.

Have the legislatures of the individual States power, by any laws which they can pass, to prohibit the sale of the tickets in the lotteries thus established in the city of Washington ?

We think the State legislatures have no such power.

This is a lottery authorized by Congress, for the purpose of making important improvements in the city, which may be styled the National City, in the improvement of which the nation is concerned. It is therefore a national lottery, authorized by the national legislature ; and it would be monstrous if any State legislature could impede the execution of a law made for national purposes, relative to a District over which the national legislature have the exclusive right of legislation. Congress have the right to judge of the proper means of improving the seat of government ; they have the power of raising those means, by any law not forbidden by the constitution, and no State legislature can, consistently either with the letter or spirit of the constitution, interfere with the exercise of this power. It may be conceded, that the power of legislation, over the district, vested in Congress by the 17th clause of the 8th section and first article of the constitution, is local and territorial with *reference to the sphere of its direct and immediate action*, but this concession leaves the matter of the present inquiry as much at large as it was before : Since it is still certain that the power itself is the power of the nation, that the whole Union are at once the grantors and (by their representatives) the depositories of it ; that the District upon which, or with a view to which, it is exerted, is entirely a national District, and that the sovereignty of Congress over it, was communicated for national ends.

But for the above-mentioned clause in the constitution, the territory included within the District of Columbia would be liable to no other legislation by Congress than that which it may exercise over the States. With views of general policy, that clause invests Congress with complete dominion over the District, in addition to, or involving and blended with, the other enumerated or general powers of Congress, which it was intended to assist and fortify.

As this dominion flows from the same source with every other power possessed by the government of the Union ; as it is exerted by the same Congress ; as it was created for the common good and for universal purposes, it is impossible that it should not be of equal obligation, throughout the Union, in its effects and consequences, with any power whatever known to the constitution.

The government of the United States is a government of enumerated powers, all of which are upon the same level. The power to raise and support armies (with all its dependent powers) may be of higher dignity than the power to legislate over the seat of the general government, but it is not of greater force, or more binding upon the States or the people. The power to raise and support armies may, and almost always will, operate more expansively, but legislation over and for the District of Columbia may, in the progress of its consequences, reach as far as legislation for military objects, and when it does so, will be of equivalent efficacy.

If Congress had deemed it expedient it might have established this lottery *directly*, instead of authorizing it by a *substitute*, and might have afterwards applied the avails (so as to bind the States) to this improvement of the District. Had it done so, who can doubt that the tickets might have been sold in each of the United States ? And yet where is the difference in the substance of the thing, and in common sense, between the two cases ?

Where can be the difference whether Congress exercise their power directly themselves, or authorize others to exercise it for them ? It is still, in either case, their power and authority which is acting.

It will be admitted by every body, that it is in the nature of a lottery that the tickets must be sold, and that they must be (as

they always are) transferable from hand to hand by sale ; and it results, from the interest every citizen of the United States has in that which is well established or created for general purposes, under the authority of Congress, and within the scope of the constitution, that he is entitled to avail himself of what is so established or created. But surely a State law which forbids a citizen to sell or to buy a ticket in a lottery, (well established under the authority of the Union, within the scope of the constitution, and for national purposes,) trespasses upon this right of the citizen, so far as it goes, interferes with the general purposes for which the lottery is established, and changes the qualities of the ticket by impairing that saleable and transferable faculty to which it owes its value, and without which the lottery itself may be wholly defeated, and must be greatly injured and delayed.

It would indeed be a strange anomaly, if what Congress had created, or authorized to be created, in a valid manner, and which entirely derives its capacity of answering the general purposes for which it was so created, from its faculty of being sold and transferred, could be considered and treated by a State as the subject of a criminal traffic ; or, in other words, if a citizen could be punished by a State for selling or buying that which Congress had, for the purpose of being bought and sold, sent, or caused to be sent, into the market of the Union, conformably to, and under the sanction of the constitution, and for a national object.

If a lottery ticket has a lawful origin under the constitution of the Union, it is a lawful lottery ticket wherever the power of the Union is acknowledged. The power of the Union, constitutionally exerted, knows no locality within the boundaries of the Union, and can encounter there no geographical impediments. Its march is through the Union, or it is nothing but a name. The States have no existence relatively to the effect of the powers delegated to Congress, save only where their assent or instrumentality is required or permitted by the constitution itself. In every other case the effect of constitutional congressional legislation is commensurate with united America ; and State legislation in opposition to it is but a shadow.

Nor is there any danger to be apprehended from allowing to congressional legislation, with regard to the District of Colum-

bia, its fullest effect. Congress is responsible to the States and to the people for that legislation. It is in truth the legislation of the States, and the people, over a District, placed under their control for their own benefit, not for that of the District, except as the prosperity of the District is involved, and is necessary to the general advantage.

The States, or the people, can only resist the natural effect of such legislation by resisting the exercise of their own sovereignty, created upon high inducements of constitutional policy.

A case of this sort bears no resemblance to that of one State repelling, within its limits, by penal sanctions, the effect of the laws of any other State, upon considerations of local expedience, or otherwise. What on such occasions one State may properly and regularly do with regard to the laws of another State, it is not fit to discuss in this place; but whatever it may do on such occasions, there is no analogy between those and the present. A State that repels the effects of the laws of another State within its territory, is no party to those laws. It has no direct interest in them. It did not assist in making them immediately, or derivatively, or constructively. It cannot assist in repealing or modifying them. But here the law is its own law, as being a member of the Union, although irrevocable by it, without the concurrence of others. The effect is for its own advantage in the eye of the constitution. It can contribute to revoke the law by its representatives in Congress, and it is bound by the constitutional grant of power, in virtue of which it has been enacted, since it participated in that grant, as in every other grant of power to the government of the Union.

Upon the whole, we are of opinion that the legislature of no individual State in the Union can, constitutionally, prohibit the sale of tickets in the lotteries established in the city of Washington, under the authority of Congress.

WM. PINKNEY,
DAVID B. OGDEN,
THOMAS ADDIS EMMET,
JOHN WELLS,
W. JONES,
JOS. OGDEN HOFFMAN.

9

.

1

11

1



3 9015 01675 8198

